No. 411

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

GEORGE SAM MAGIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on June 10, 1960.

I.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported.

The opinion is set forth as an appendix hereto, p. 43.

II.

GROUND OF JURISDICTION OF THIS COURT.

The date of the judgment of the Court of Appeals sought to be reviewed is June 10, 1960.

A timely petition for rehearing was filed by the petitioner, and was denied by the Court of Appeals July 25, 1960.

An order of August 18, 1960, by Mr. Justice Clark; extended to September 13, 1960, the time for filing this petition for certiorari.

The statute believed to confer on this Court jurisdiction to review the judgment by writ of certiorari is § 1254 (1), Tit. 28, U. S. C.

III.

QUESTIONS PRESENTED FOR REVIEW.

Petitioner stands convicted of a violation of § 1621, Tit. 18, U. S. C., for allegedly testifying falsely before a grand jury. The following basic questions involve the denial of petitioner's constitutional rights to confrontation of witnesses, compulsory process for obtaining witnesses, due

process of law in judicial proceedings, and refusal by the court to conform to the decisions of this Court and the decisions of other Courts of Appeals with respect to proof and instructions.

1. Does the "two-witness rule," as stated in Weiler v. U. S., 323 U. S. 606, apply as to the quantum of proof necessary to sustain a finding of knowledge on the part of the defendant in contradiction to his utterance under oath —the element specifically required under the terms of the statute,—or does it apply only as to the quantum of proof necessary to sustain a finding of objective disparity between fact and utterance—an element not required to be proved under the terms of the statute?

2. May the trial court decline to instruct the jury in the language approved in Weiler v. U. S., 323 U. S. 606, in respect of the "two witness rule," and instead substitute other terminology which would authorize conviction if there was testimony by two witnesses on any issue, regardless of the independence of such witnesses?

3. May a conviction stand when there is no evidence in the record of any act, omission or assertion by the accused from which knowledge contrary to his utterance under oath may be inferred (as required by American Communications Association v. Douds, 339 U. S. 382, and U. S. v. Remington, 191 F. 2d 246), and where the jury has been instructed specifically that direct evidence of knowledge is not necessary and that the jury may deduce and find the fact of such knowledge circumstantially from all the evidence in the case?

4. May the trial court, contrary to the guaranty of compulsory service of process incorporated in the Sixth Amendment to the Constitution, forbid the defendant to subpoena the grand jurors and their attending United States attorneys, even though they are eyewitnesses to the

act allegedly constituting the crime and sole repositories of knowledge essential to determination of the question as to whether a crime had, in fact, been committed?

5. In a criminal prosecution, does such prejudice result as to amount to a denial of due process when the government: (a) refuses to consent to a pre-trial inquiry to determine whether a prospective prosecution witness will claim the protection of the Fifth Amendment if called to the stand, then (b) calls the witness to the stand and by repeated questions elicits from him before the jury numerous claims to the privilege, and finally (c) virtually demonstrates that there was no necessity to call him in the first place by bringing to the stand another witness who supplies the required evidence without claim of privilege?

6. In a criminal prosecution, may Title 28, Sections 1732, 1733, be employed to place in evidence documents which do not emanate from the defendant, and in respect of which he is not shown to have had any prior knowledge, regardless of the guaranty of confrontation incorporated in the Sixth Amendment to the Constitution?

7. May the trial court remove from the jury the right to pass upon the credibility of witnesses relied on to establish the nature and extent of the grand jury proceedings by instructing that the question of materiality of the defendant's testimony is a question of law to be decided by the court?

8. In a prosecution for perjury allegedly committed before a Grand Jury, may the trial court:

(a) Refuse on motion of Petitioner to dismiss the indictment, where the only witnesses, to-wit: the clerk and jury commissioner, testify to facts disclosing that the jurors were neither qualified nor drawn in accordance with Tit. 28, §§ 1861, 1864 and 1865, U. S. C.?

(b) Refuse, at time of trial, an offer to prove facts which, if true, would require a finding that the Grand Jury before whom the Petitioner testified was not a lawful body, on the basis of having previously determined such question on motion to dismiss, and that such question was determinable by the court and not the jury?

9. In a criminal prosecution, does the trial court deny the Petitioner due process of law contrary to the Fifth Amendment of the Constitution of the United States, where it:

(a) Refuses to transfer the case for trial to a portion of the District, or to another District, in which an impartial trial might be secured, where Petitioner substantiates his request by voluminous evidence indicating probable prejudice.

(b) Specifically orders a trial jury to be drawn from the restricted area in which the Petitioner claimed prejudice probably existed.

(c) Refuses to permit an attorney for the Petitioner, who claimed, and whom the Petitioner claimed, might become a material witness for the Petitioner, to withdraw as an attorney of record.

(d) Denies the Petitioner other rights granted him by the Constitution of the United States, or accorded him under the decisions of this Court, as particularized hereinabove.

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The pertinent constitutional and statutory provisions involved in this case are set forth in Appendix B, infra, pp. 54 to 57.

V.

STATEMENT.

This is a prosecution for violation of Tit. 18, § 1621, U. S. C., by the giving of false testimony.

The petitioner was found guilty under two counts of an indictment.[1]

The first count charged that petitioner violated the statute when, on August 10, 1956, before a federal grand jury, he testified that he had never had any business connection as a partner or associate in any association, partnership, or corporation with one Elmer Dowling. The second count charged that petitioner violated the statute when, on the same day before the same session of the grand jury, he testified he had never been interested in any business, corporation, partnership or association with one Frank Wortman (R. 7).

At trial, the government offered (and the District Court received) evidence tending directly to show the following:

> 1. That during the years 1951 to 1955, inclusive, six separate gambling ventures or enterprises, known as the Cash Sales Co. (which operated in 1951), the Club Ville (which operated in 1951), the Empire Club (which operated in 1951), the 7800 Club (which operated in 1952), the R. R. Club (which operated in 1952, 1953 and 1954), and the Junction "T" Club (which operated in 1955), functioned in southern Illinois (R. 90-92).

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[1] The indictment, as returned, contained four counts. The fourth count was dismissed before trial; under the third count, petitioner was found not guilty. This petition does not purport to reflect either of these counts, or any proceedings under them.

2. That none was a formally-chartered corporation, but that all were financially organized on a participating-share ownership basis (R. 90-92).

3. That a total of 23 persons owned participating shares in the ventures, with the number in each venture ranging from eight to 13; and that the shares differed in amounts, ranging from 5 percent to 32½ percent (R. 90-92).

4. That petitioner owned minor shares in all the ventures, his usual share being 5 percent, and in respect of one venture amounting to 10 percent (R. 90-92).

5. That both Dowling and Wortman owned substantial shares in each venture, Dowling's shares ranging from 15 percent to 17½ percent, and Wortman's shares ranging from 20 percent to 32½ percent (R. 90-92).

The government also offered (and the District Court received) evidence tending directly to show that petitioner had given before the grand jury the testimony charged to him (R. 80).

Substantially, the government's evidence consisted of the federal income tax returns of the several gambling ventures, together with their ledgers and other books of account. All of them listed Dowling, Wortman and the petitioner (together with others) as shareholders of record, and stated the share owned by each shareholder and the amount of dividend paid him. The government also placed in evidence the personal income tax returns of petitioner and his wife, which showed the receipt of the dividends apportioned to petitioner from the ventures (R. 90-93).

The government also adduced evidence, in the shape of other answers by the petitioner before the grand jury, that

he was a friend of both Dowling and Wortman and a neighbor of Wortman.[2]

The government did not, however, offer any evidence whatsoever of a direct nature showing that petitioner knew at the time he appeared before the grand jury that Wortman and Dowling were the owners of shares in the ventures in which petitioner owned shares at the times of petitioner's ownership.

Petitioner was not shown to have participated in any way in the management or operations of the ventures; and his returns showed him to have been employed as a restaurant manager during the period in question. The tax returns filed in behalf of the ventures were not signed by him, and there was no evidence that he participated in any way in their preparations; in fact, the accountants who did prepare them put on the stand by the government, conceded on cross-examination that they had not communicated the contents of the venture returns to petitioner.

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[2] The answers, with their preceding questions, were as follows (R. 7):

"Q. [By Assistant United States Attorney Morris] Mr. Magin, tell us when you first met Buster Wortman?
"A. [by the petitioner] About nine years ago.
"Q. Who introduced you to him?
"A. He was a customer and came in Bush's [restaurant] while I was working there.
"Q. And you and Buster Wortman are close friends, aren't you?
"A. Friends and neighbors, yes.

* * * * * * *

"Q. Do you know Dutch Dowling, Elmer Dowling?
"A. Yes, sir.
"Q. How long have you known Mr. Dowling?
"A. Three or four years.
"Q. Three or four years?
"A. About that, yes.
"Q. Who introduced you to Mr. Dowling?
"A. I met him at the Paddock.
"Q. Was he alone when you met him?
"A. I am quite sure he was but I don't recall."

The account books and records of the ventures were kept under the supervision of the same accountants who prepared the tax returns, and on cross-examination they also conceded that the contents of the books and records, to their knowledge, had not been communicated to petitioner (R. 101-105; 110-120).

There was no evidence that petitioner had ever attended any meeting of the shareholders of the ventures.

There was no evidence that petitioner had ever signed any articles or agreement of association setting forth the names of Dowling and Wortman as share owners, or bearing their signatures, or the signature of either of them.

There was no evidence that petitioner had ever received any communication of any kind from any of the ventures or from any other source showing or indicating that Dowling and Wortman were shareholders. The dividend checks received by petitioner were placed in evidence by the government, but they were signed by the managers of the ventures, and did not set forth the names of Dowling and Wortman (R. 108).

With the exception of the allegedly perjurious assertions themselves, the other testimonial statements before the grand jury, and the tax returns of petitioner and his wife, there was no evidence in the case emanating from the petitioner.

The jury returned a verdict of guilty on both counts.

Petitioner appealed to the Court of Appeals for the Seventh Circuit. It affirmed. Responding to petitioner's contentions that there had been no direct evidence of belief in contradiction to utterance, and that therefore under the rules applicable to perjury prosecutions there could be no conviction, the Court of Appeals ruled that circumstantial evidence could be used for the purpose, just as

circumstantial evidence can be used in other criminal cases to establish guilt.

Petitioner cited to the Court of Appeals the Second Circuit decision in U. S. v. Remington, 191 F. 2d 246, as ruling that direct evidence of a perjurious state of mind was essential to conviction under the federal statute, and that such direct evidence must consist of the testimony of two witnesses, or one witness corroborated, as to some overt act from which the jury might infer a belief contrary to the defendant's oath.

Petitioner also cited to the Court of Appeals the decision of this Court in American Communications Association v. Douds, 339 U. S. 382, as holding that in perjury cases the mental state of the alleged perjurer was the crucial issue, to be proved by outward manifestations of the state of mind, and that in the absence of such proof of outward manifestations there can be no successful prosecution.

The Court of Appeals rejected the Remington case as erroneous, and distinguished the Douds case as differing on the facts. It held that there were two crucial elements in a perjury case, the element of objective falsity, or disparity between the utterance and the actual fact, and the element of subjective falsity, or disparity between the utterance and the knowledge or belief of the accused at the time of utterance. The various restrictive rules concerning perjury prosecutions, it asserted, referred to the first, not the second, element.

* * * * * * *

Prior, during and after the grand jury session (August, 1956) and the return of the indictment (December, 1956), numerous articles, with photographs, appeared in the St. Louis and East St. Louis newspapers (which have a general circulation in the East St. Louis area and in south-

western Illinois), of a highly derogatory and prejudicial character.

Petitioner, by motion to transfer and two subsequent amended motions to transfer, to which were attached copies of the inflammatory newspaper stories, requested that the case be transferred for trial to Danville, Illinois 200 miles from East St. Louis, in the Eastern District of Illinois—or to some other district (R. 11, 27).

All such motions were denied by the District Court.

The case was tried at East St. Louis, and the District Court directed the jury to be drawn from a restricted area within 150 miles of East St. Louis, rather than from the entire district or from a portion of the district beyond the East St. Louis area.

The petitioner prior to trial challenged the validity of the grand jury by motions to dismiss the indictment. The District Court Clerk and Jury Commissioner testified to facts indicating that the members of the grand jury were not properly qualified, and were not drawn in accordance with federal statutes (R. 15, 26).

The District Court denied the motion.

Prior to trial, Ray M. Foreman, the petitioner's attorney, filed a motion for leave to withdraw, on the ground that he might become a material witness for the petitioner (App. Pet. Reh. 57-62).

The District Court denied the motion.

Thereafter, the petitioner filed a motion for a continuance, asserting that his attorney might become a material witness, reiterating the factual matters involved, and asking to employ other counsel as trial attorneys (App. Pet. Reh. 62-70).

The District Court granted the continuance for some three months, but again refused to allow his attorney's motion to withdraw from the case.

* * * * * * *

Seventeen days before the opening of trial in the District Court the petitioner filed his motion praying leave to subpoena as witnesses the grand jurors before whom he was alleged to have committed perjury and the government attorneys who had assisted them, and also praying leave to interrogate them, as witnesses before the court, in respect of matters occurring before the grand jury material to the issues of the case (R. 29).

The motion pointed out that the issues in dispute included the question of whether the defendant made the allegedly perjurious statements attributed to him and the question of whether the grand jury, at the time the allegedly perjurious statements were made, was engaged in any investigation or consideration in respect of which the statements were material. It also stated that the petitioner believed he had the right to the issuance of compulsory process for the attendance of the jurors and attorneys under the Sixth Amendment to the constitution, but that certain cited decisions and regulations (**U. S. v. Smyth**, 104 F. Supp. 279, 282; **U. S. v. Lennon**, 148 F. Supp. 492, 493; **U. S. v. Silverman**, 132 F. Supp. 820, 823; **Federal Criminal Rule 6 [e]**) had raised questions which made adjudication of the matter desirable before trial.

The District Court denied the motion.

At trial the government, having successfully opposed the effort of the government to subpoena all the jurors and all the attorneys, proceeded to prove its version of the matter by using one of the jurors and two of the three attorneys (R. 49, 67).

Before the Court of Appeals, petitioner urged error in the District Court ruling, and asserted that the prejudice to him by reason of the denial of his constitutional right to process had been exacerbated when the government proceeded to do what had been denied him.

The Court of Appeals rejected his contention, pointing out that grand jury proceedings were secret, although, with apparent inconsistency, also reciting that the petitioner had exercised the right to a vigorous and broad cross-examination of the grand juror and the two attorneys produced by the government. It did not allude to the petitioner's contention that the version of the absent witnesses might have differed from that given by the witnesses who did appear on the stand.

* * * * * * *

After the jury had been selected in the District Court the petitioner, through his counsel, advised the court that he believed the government intended to place on the witness stand Dowling and Wortman and two other witnesses, the managers of the gambling enterprises, and that he believed that if they were placed on the stand they would claim the privilege against self-incrimination under the Fifth Amendment to the constitution. Petitioner's counsel therefore moved that the court conduct a preliminary inquiry to determine whether the claim would be made (R. 35-39).

The District Court denied the motion.

Thereafter, during the trial, the government placed each of the named witnesses on the stand, and proceeded to question them. A total of 74 claims of the privilege against self-incrimination was elicited in response to the government's interrogations. Most of the claims were elicited in response to questions by the government designed to secure the identification of certain checks; and almost im-

mediately after the witnesses were dismissed the government placed on the stand other witnesses who did not claim any privilege and readily obtained from them the desired identification, and the exhibits went into evidence (R. 97, 108-109).

On appeal to the Court of Appeals the petitioner alleged error both in refusing the preliminary inquiry and in permitting the extended inquiry. That Court, however, denied the contentions, holding that the inquiry sought would have delayed the trial and that any prejudice from a failure to hold the inquiry had been cured by a cautionary instruction by the District Court to the jury.

* * * * * * *

Virtually the entire government proof that Dowling, Wortman and the petitioner were concurrently shareholders in the gambling ventures consisted of tax returns signed by others, fiscal books and records kept by others and checks issued by others. In respect of none of them was any evidence adduced that petitioner knew of them or their contents. The tax returns were offered and received under Tit. 28, § 1733, U. S. C.; the basis of the admission of the other instruments is not clearly reflected by the record, but it is believed that they were offered and received under Tit. 28, § 1732, U. S. C. (R. 90-122; Gov. Exs. 4-41b).

Petitioner objected to their admission in evidence as against him as violating the constitutional guaranty of confrontation by witnesses under the Sixth Amendment and renewed the point on appeal to the Court of Appeals. The Court of Appeals did not allude to the point specifically, but lumped it with other points which it found "to be without merit."

At the conclusion of the plaintiff's case in the District Court the petitioner, following the technique suggested in

the Remington decision, requested that the Court require the government to state and specify the overt acts relied upon by the government as showing the petitioner's perjurious knowledge, i. e., his belief in contradiction to his utterance (R. 124).

The District Court denied the motion.

On appeal to the Court of Appeals, the petitioner assigned the action of the District Court as error, but the Court of Appeals did not allude specifically to the point.

* * * * * * *

At the conclusion of the trial the District Court instructed the jury that whether a statement made by a witness before a grand jury was material to the matter being investigated by the grand jury was a question of law to be determined by the Court, and followed this by an instruction which in substance told the jury that if it found that the questions to the petitioner were asked as alleged and answered as alleged, then under the law the defendant's statements were material. The petitioner objected on the ground that the instructions operated to remove from the jury's consideration the question of what matter was, in fact, being investigated, and also the question of the credibility of the government's witnesses as to what was being investigated (R. 138-143).

The District Court overruled the objection, and on appeal the Court of Appeals did not allude to the point.

* * * * * * *

Three times during the course of its charge to the jury the District Court instructed the jury that it was free to draw conclusions from circumstantial evidence. It first enjoined the jury "to draw and act upon those just and reasonable inferences and deductions which you as men

and women would ordinarily draw from the facts and circumstances proved in the case." It then told the jury that "direct proof of willful or wrongful intent or knowledge is not necessary", but that "intent and knowledge may be inferred from acts, and such inferences may arise from a combination of acts, although each act standing by itself may seem unimportant. These are questions of fact to be determined from all the circumstances." Finally, it instructed the jury that "to willfully swear falsely means to swear falsely deliberately, knowing that the testimony is false. Proof of this willfulness may be inferred from the facts and circumstances surrounding the false statements, if any such false statements were made" (R. 140, 141).

The petitioner objected, on the ground that the instructions were in substantial violation of the rule in the federal courts forbidding a conviction of perjury on circumstantial evidence, but the objection was overruled.

On appeal, the Court of Appeals did not allude specifically to the point.

* * * * * * *

The petitioner requested the District Court to give to the jury, verbatim, the instruction on the "two-witness" rule in perjury cases approved by this Court in **Weiler v. U. S.**, 323 U. S. 606, 607. The request was refused, and instead the District Court gave an instruction which, while referring to the two-witness rule, did not clearly require that the element of falsity be proved in accordance with it, but was susceptible to an interpretation that the only requirement was that more than one witness testify in the case (R. 140-142).

On appeal, the Court of Appeals did not allude specifically to the point.

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VI.

ARGUMENT FOR ISSUANCE OF WRIT.

1.

Explicit Conflict With Second Circuit;
Implicit Conflict With Other Circuits
And With This Court.

The opinion below explicitly and by name rejects as "erroneous" the ruling Second Circuit case of **U. S. v. Remington**, 191 F. 2d 246.

Implicitly, it also rejects the Third Circuit cases of **U. S. v. Nessanbaum**, 205 F. 2d 93, **U. S. v. Alu**, 236 F. 2d 179, and **U. S. v. Rose**, 215 F. 2d 617; the Fifth Circuit case of **Beckanstin v. U. S.**, 232 F. 2d 1; and the Eighth Circuit case of **Fotie v. U. S.**, 137 F. 2d 831.

Remington ruled, in accordance with the express language of § 1621 and with previous decisions in the Second Circuit (**U. S. v. Hiss**, 185 F. 2d 822, cert. den. 340 U. S. 948; **Sharron v. U. S.**, 11 F. 2d 689), that the sole crucial element of a perjury prosecution under federal law is knowledge and belief on the part of a defendant contrary to his utterance under oath. Objective disparity between actual fact and statement, it held, is surplusage.

With this as a premise, **Remington** proceeded to hold that the "peculiar rule concerning proof in perjury cases" —the rule requiring "direct" evidence of the crime by two witnesses who testify that the accused violated his oath, or "direct" evidence by one witness plus corroborating circumstances—means that to sustain a perjury conviction in a federal court there must be testimony from two witnesses (or one witness, corroborated) directly

as to some overt act or demonstration of a state of mind, emanating from the defendant, showing his knowledge. 191 F. 2d 248, 249.

Remington cited **American Communications Association v. Douds**, 339 U. S. 382, as supporting its view that the state of a defendant's mind, i. e., his knowledge and belief, must be proved by what the defendant says or does, and not by the general circumstantial context of the case, and that in the absence of such proof "there can be no successful prosecution for false swearing." 191 F. 2d 248. It did not, however, base its decision upon **Douds**; rather, its ratio decidendi was that since the governing statute did not make objective disparity an element of the crime the restrictive rules requiring direct testimony necessarily applied to disparity between belief and assertion.

The Court of Appeals below did not respond to the logic of the **Remington** case but simply held that objective disparity was an essential element of the crime, regardless of the silence of the statute in respect of it, and that the restrictive rules of perjury prosecution applied to it, and not to the subjective disparity between belief and utterance. As to the latter element, it ruled, circumstantial evidence was sufficient, "just as circumstantial evidence can be used in other criminal cases to establish guilt of an accused beyond a reasonable doubt."

The Court of Appeals acknowledged a "conflict of authority." **Remington**, it said, was really based on an interpretation of **Douds**, and the interpretation was wrong because **Douds** was speaking of "belief" in a different sense than the sense employed in **Remington**.

The **Nessanbaum, Alu, Rose, Beckanstin** and **Fotie** cases were not mentioned by the Court of Appeals.

In the District Court charge, the jury were twice specifically instructed that the knowledge of the petitioner contrary to his utterance under oath might be determined

circumstantially. In addition, the District Court told the jury, without limitation: "What you should do in this case is bring into consideration of the evidence before you the everyday common sense and judgment of reasonable men and women. You, as jurors, should draw and act upon those just and reasonable inferences and deductions which you as men and women would ordinarily draw from the facts and circumstances proved in this case."

The jury were thus told that any issue in the cause might be determined by circumstantial evidence.

That is not the law in the federal courts. **Weiler v. U. S.**, 323 U. S. 606, 608; **U. S. v. Otto** (2), 54 F. 2d 277, 279; **U. S. v. Nessanbaum** (3), 205 F. 2d 93, 97; **Clayton v. U. S.** (4), 284 F. 2d 537, 539; **Radomsky v. U. S.** (9), 180 F. 2d 781, 783.

The defect was not cured by a subsequent instruction that the law did not permit conviction on circumstantial evidence alone, but required that the government bring forth evidence which was direct and positive. Considering both directions together, which, it must be presumed, the jury did, the only conclusion must have been that if there was any direct and positive evidence in the case on any issue the jury could proceed to convict even if the crucial issue was but circumstantially proven.

Petitioner believes that it is to the public interest that there be resolved the conflict between the opinion and decision below and the decisions in the **Remington**, **Nessanbaum**, **Alu**, **Rose**, **Beckanstin** and **Fotie** cases in respect of the question as to whether direct evidence of a contradiction between belief and utterance is necessary to a perjury conviction under federal law.

Petitioner also believes it is to the public interest that the language of this Court in **American Communications Association v. Douds**, that

> . . . . false swearing . . . must, as in other cases where mental state is in issue, be proved by the outer manifestations of state of mind."

and that

> . . . . in the absence of such manifestations, . . . there can be no successful prosecution for false swearing."

be clearly interpreted so as to settle its application to prosecutions under § 1621.

Although the Court of Appeals, in its opinion, did not expressly allude to the petitioner's objection that the charge in the District Court violated the established federal rule that a perjury conviction may not rest on circumstantial evidence, the petitioner believes that the language employed by the Court of Appeals sanctioned a departure from the doctrine, and that it is to the public interest that the propriety of that departure be ruled upon.

The District Judge incorporated the following instruction in his charge:

> "You cannot convict the defendant of the offense on the uncorroborated statement of any one witness. A conviction of perjury must be based upon the testimony of two or more witnesses, or if only one witness, then such witness must be corroborated by other substantial evidence in order to establish the falsity of the defendant's testimony."

In **Weiler v. U. S.**, 323 U. S. 606, this Court approved the following instruction (323 U. S. 607):

> "The government must establish the falsity of the statement alleged to have been made by the defendant under oath by the testimony of two independent witnesses or one witness and corroborating circumstances.

Unless that has been done, you must find the defendant not guilty."

Failure to give it was held reversible error.

The quoted portion of the charge below must be considered as an effort to render the substance of the **Weiler** instruction. We submit that the effort failed, with prejudice to the petitioner. The charge as given does not require that falsity be proved by two independent witnesses, or one witness, corroborated; it says that a conviction cannot be had on the uncorroborated statement of one witness, but that a conviction must be based on the testimony of two or more witnesses, or of one witness with substantial corroboration. The phrase, "to establish the falsity of the defendant's testimony," tacked to the end, contributes nothing grammatically or logically. The instruction, read as it is written, authorizes a conviction if two witnesses testify in a case, even though their testimony has nothing to do with the issue of falsity, or if one witness testifies, and is corroborated, even though his testimony and the corroboration thereof are on some other issue. The requirement that the witnesses (if there were two) be "independent" was wholly ignored in the District Court's charge.

The defendant requested that the clear and unambiguous language approved in **Weiler** be employed, but was refused.

Petitioner believes that here, again, the Court of Appeals, by failing to pass upon the question, has so far sanctioned a departure by the District Court from the accepted course of proceedings as to call for an exercise of this Court's power of supervision.

2.

Denial of Constitutional Right to Compulsory Process to Obtain Witnesses.

Petitioner believes that it is to the public interest that this Court resolve the question of whether, when a crime is allegedly committed before a grand jury and when the grand jurors necessarily know the facts upon which a conviction or acquittal may turn, a defendant may be refused the right to subpoena them (and their advising government attorneys) as witnesses at his trial, notwithstanding the guaranty of compulsory process set forth in the Sixth Amendment to the Constitution.

The District Court below denied petitioner the right, even though the constitutional guaranty was specifically cited. The Court of Appeals mentioned the constitutional guaranty, but gave it no discussion. It affirmed the District Court's action, holding (1) that the government itself had placed on the stand one of the 23 grand jurors and two of the three government attorneys and that they were subjected to a broad and vigorous cross-examination, thereby (presumably) affording the petitioner all necessary information, and (2) that the grand jury proceedings are secret and should not be disclosed.

Not only was the reasoning of the Court of Appeals inconsistent but it wholly ignored the crux of petitioner's protest: that the practice followed in the trial simply permitted the government to pick and choose from a group of witnesses to a crime those whose testimony would support the government's contentions, while the defendant was denied all access to the remainder in an effort to refute the government.

Petitioner's protests were not academic. Not only were the grand jurors eye-witnesses to the act which purport-

edly constituted the crime, but they constituted the only repositories of fact in respect of an essential issue in the prosecution: the nature and extent of the grand jury's investigation when the crime was allegedly committed. Both the indictment and the government's evidence suggested that the investigation in progress when the petitioner allegedly perjured himself might well have been an investigation within the cognizance of a grand jury in the Southern District of Illinois, where the office of the Director of Internal Revenue having jurisdiction over the territory is located, rather than that of the Eastern District of Illinois; yet if that were true no crime could have been committed in the Eastern District, regardless of how false the statements were. **Brown v. U. S.** (8), 245 F. 2d 549, 554; **Bowles v. U. S.** (4), 73 F. 2d 772; **U. S. v. Warring** (D. C.-Md.), 121 F. Supp. 546. And even if this Court should not agree with us in this precise connection, petitioner should have been afforded an opportunity to establish, if he could, that the activities of the grand jury below—the same grand jury indicted him that heard his alleged perjury—were not true inquisitorial exercises, but in fact were excursions with the purpose of extracting testimony with a view to perjury prosecution. **U. S. v. Icardi** (DC-D. C.), 140 F. 2d 383, 384.

A suggestion that the latter possibility may have been the case may be found in the fact that the grand jury, at the time the questions were put to the petitioner which resulted in his indictment, had before it the definite and specific answers, under the signatures and oaths of persons in a far better position to know than the defendant, to those precise questions, in the shape of the income tax returns of the ventures under consideration (R. 90-92; Gov. Exh. 4-10).

3.

Denial of Fair Trial Because of Interjection of Avoidable Claims of Self-Incrimination Privilege.

Petitioner believes that it is to the public interest that this Court resolve the question of whether, in a criminal prosecution, the trial judge should afford the defendant a preliminary inquiry to determine whether prosecution witnesses, identified as associates of his, will claim the protection of the Fifth Amendment if placed upon the stand.

The hearing was requested in the case below, but the District Court denied it. On appeal, the Court of Appeals affirmed the District Court's action on the grounds, first, that if granted it "would have delayed the trial," and, second, that "the trial court gave a proper cautionary instruction."

The trial below would not have been delayed by the requested hearing as much as it was delayed by the intervening contempt proceedings which interrupted the trial when one of the witnesses did, in fact, claim the protection against self-incrimination. And particularly in view of the great number of claims to the privilege elicited by the prosecution (see below), we do not believe that the cautionary instruction given was curative of the error in failing to afford the hearing.

Conduct of prosecutors in calling to the stand a witness when they have good reason to believe the witness will claim the privilege has been repeatedly condemned. **U. S. v. Amadio** (7), 215 F. 2d 605, 613; **U. S. v. Hiss** (2), 185 F. 2d 822, 831; **U. S. v. Tucker** (3), 267 F. 2d 212, 215; **U. S. v. Five Cases** (2), 179 F. 2d 519, 523; **U. S. v. Maloney** (2), 262 F. 2d 535, 537; **McClure v. State**, 95 Tex.

Crim. 53, 251 S. W. 1000; **Rice v. State**, 121 Tex. Crim. 53, 51 S. W. 2d 364. On the other hand, it must be conceded that the right of a witness to claim the privilege extends to specific questions asked, and not to his general obligation to assume the witness stand and be sworn.

The procedure sought by the petitioner below would seem to have offered the opportunity to the trial court to settle the conflicting interests of prosecution, defendant and witness in an orderly manner, with adequate protection to the rights of all. The jury being excluded, the prosecution could be afforded the widest latitude in its interrogation and persuasion without prejudice to the defendant's rights, and the legal question of the obligation of the witness to respond could be settled after the fullest exploration without the suggestion of criminality which inevitably follows procedures before an untutored jury.

Moreover, the procedure sought by petitioner would have served to avoid the objection frequently raised by the prosecution in connection with the problem, i. e., that if the prosecutor fails to call the witness who will claim the privilege defendant's counsel will comment on the failure to the jury. Clearly, we believe, a prior objection by the defendant (which would necessarily follow a pre-trial hearing which disclosed the intention of the witness to claim the privilege) would estop any right to comment if the witness is not placed on the stand.

Following the District Court's denial of the petitioner's request for the preliminary hearing, the government proceeded to put the named witnesses on the stand (R. 97, 108, 109).

The first witness called was one Claus Tietje, the manager of certain of the gambling ventures (R. 97). He at first claimed the privilege four times in answer to the government's questions before the jury. The jury were

then excused and he was further interrogated. Then the jury were brought back and 25 more questions were put to him, and he claimed the privilege 25 times more.[3] Then one Edward J. Hare, manager of certain other of the ventures, was placed on the stand (R. 108). A total of 28 questions were put to him, and he claimed the privilege 28 times. Wortman was placed on the stand next, and he claimed the privilege 10 times (R. 109). Dowling was then called and claimed the privilege seven times (R. 109).

A total of 74 claims against self-incrimination were thus elicited before the jury, and they were elicited from men who had otherwise been identified as associates of the petitioner, and in connection with a transaction in connection with which petitioner was under indictment.

The questions directed to Tietje, and in respect of which he claimed the protection of the Fifth Amendment, although totally 29, all were requests to identify 12 checks which he had issued as manager of the gaming enterprises. (In some cases he was asked twice, or three times, to identify the same check.) Each and every one of the checks was subsequently either identified by another government witness who did not claim any privilege and admitted into evidence, or stipulated into evidence by the petitioner.

Of the 28 questions directed to Hare, and in respect of which he claimed the privilege against self-incrimination, four were requests that he identify certain documents, while the remainder were questions as to the witness's in-

[3] Tietje was jailed for contempt. He appealed to the Court of Appeals for the Seventh Circuit. The Department of Justice, having previously entered the case by reason of an application for bail to a Justice of this Court, responded in the Court of Appeals by confessing error on the ground that Tietje was not custodian of the checks and could therefore properly claim the privilege. The judgment finding Tietje in contempt was reversed. U. S. v. Tietje, 275 F. 2d 77.

terests in the ventures and the times or periods during which they operated. One of the documents had been previously admitted in evidence; three were subsequently admitted on identification by other witnesses; and Hare's connection with the ventures had been amply shown if the substantial evidence in the case was validly admitted.

Of the 10 questions put to Wortman, and in respect of which he claimed the privilege against self-incrimination, only two had any direct reference to the petitioner, one of them being a question as to whether Wortman knew the petitioner and the other being a question as to whether he had ever had any business association with the petitioner. The others were concerned only with Wortman's business activities, his personal tax returns and his marital status.

Of the seven questions put to Dowling, and in respect of which he claimed the privilege, none contained any direct reference to the petitioner, and all had reference to his personal tax returns and his business activities.

Petitioner believes that the subsequent development of the record in respect of the questions propounded to Tietje and Hare, and the character and nature of the questions propounded to Wortman and Dowling, indicate that the summoning of these four witnesses to the stand was not for the purpose of eliciting facts material to the issues in the cause but instead for the purpose of demonstrating the criminal propensities of petitioner's associates, and thus convicting him by association.

Petitioner's counsel objected to the procedure in the trial court on the ground that it was prejudicial, and again, on appeal to the Court of Appeals, renewed his contentions. The Court of Appeals did not advert to the number of times the government elicited the claim against self-incrimination or to the nature of the questions asked

by the government or the subsequent admission of evidence which was the subject-matter of the interrogation. In fact, the Court of Appeals did not pass upon the substantive question of whether the conduct of the prosecutor was prejudicially erroneous, but confined itself to the question of the propriety of the trial court in refusing a preliminary hearing. This, as we have stated above, it found to be without error.

4.

Denial of Right to Confrontation by Witnesses.

Over the objection of the petitioner, the trial court admitted in evidence against him six income tax returns of the ventures named the Cash Sales Co., the 7800 Club, the R. R. Club and the Junction "T" Club, an application for a social security designation by the venture known as the Club Ville, five individual income tax returns of Frank Wortman, five individual income tax returns of Elmer Dowling, six fiscal records of the ventures in this paragraph first named, four checks payable to Wortman, and four checks payable to Dowling (R. 90-92, 94-95).

The tax returns were offered and received under Tit. 28, § 1733, U. S. C.; the basis of the admission of the other instruments is not clearly reflected by the record, but it is believed they were offered and received under Tit. 28, § 1732, U. S. C.

None of the exhibits was signed by the petitioner. There was no evidence that he had ever seen any of them prior to their production at trial. To the contrary, in respect of some of them, there was affirmative testimony, elicited on cross-examination, that they had not been shown to him.

Employment by the prosecution of §§ 1732 and 1733 in criminal causes has been challenged as violative of the confrontation guaranty of the Sixth Amendment, and the challenge has been denied. **U. S. v. Leathers** (2), 135 F. 2d 507, 511. But caution has been signalled in connection with the sections (**Palmer v. Hoffman**, 318 U. S. 109, 111; **Zacher v. U. S.** [8], 227 F. 2d 219, 227; **Hartzog v. U. S.** [4], 217 F. 2d 706, 709), and it has been cogently observed that the right of Congress to legislate on the rules of evidence should not be held so extensive as to authorize the undermining of the basic principles of the constitutional protection by carving out continually wider exceptions to the traditional hearsay rule (**Mathews v. U. S.** [5], 217 F. 2d 409, 418). The sections are, of course, exceptions to the hearsay rule legislatively contrived; and the essence of the confrontation guaranty of the Sixth Amendment is simply protection against conviction by hearsay evidence, without the right of cross-examination.

We think the admission of the exhibits here was error because of the guaranties of the Sixth Amendment, applied in connection with the precise type of criminal case which is at bar—a perjury case.

The entire theoretical basis of §§ 1732 and 1733 is that the admission of written declarations not subject to cross-examination is without harm if the declarations are in such form and kept in such manner that it is circumstantially probable that they are correct. **Palmer v. Hoffman**, 318 U. S. 109, 112 et seq. "Circumstantial probability of trustworthiness" is, precisely, the supporting reason ascribed by Professor Wigmore (**5 Wigmore, Evidence [III Ed.], 204**).

But while circumstantial evidence may be enough to convict of the gravest of crimes, murder (cf. **State v. Storey**, 148 Minn. 398, 182 N. W. 613), the "peculiar rule" of perjury prosecutions simply forbids a conviction of

that crime to rest upon it. **Radomsky v. U. S.** (9), 180 F. 2d 781, 783; **U. S. v. Otto** (2), 54 F. 2d 277, 279; and see the cases cited elsewhere in this brief under that proposition.

Moreover, it is absurd, we respectfully submit, to ascribe trustworthiness sufficient to ignore the hearsay rule to private income tax returns merely because they are on file with the government when we know that the chief occupation of thousands of employees of the revenue department is precisely that of determining their untrustworthiness.[4]

5.

Denial of the Right to Have Jury Pass Upon the Credibility of Witnesses.

The District Court incorporated in its charge to the jury an instruction telling the jury that "whether a statement made by a witness before a grand jury is material to the matter then being investigated by the grand jury is a question of law to be decided by the Court." It followed this by an instruction that if the jury found beyond a reasonable doubt "that the grand jury inquiry took place as alleged, and that in reply to the questions the defendant testified in substance (1) that he had never had any business connections, either as a partner or as an associate in any association, partnership or corporation with Elmer

[4] We think the government here will admit what it is impossible to show of record: That in another case now pending below (U. S. v. Wortman et al., No. 19,199, United States Court for the Eastern District of Illinois) the precise tax returns and reports here under consideration are necessarily under attack as untrustworthy, i. e., as not truly reflecting the matters they purport to show. The exact evidentiary purpose in that case may be, and probably is, different from the exact evidentiary purpose here; but the action of the government in pressing for their admission here as of circumstantially probable trustworthiness seems incongruous indeed.

'Dutch' Dowling, and that he had never been a partner with Elmer 'Dutch' Dowling; and (2) that he had never been connected with Frank Wortman in any business association, and that he had never been interested in any business corporation, partnership or association with Frank Wortman, * * * then you are instructed, ladies and gentlemen, that the statements would be material to the matter being investigated" (R. 133).

The quoted portion of the charge had the effect of foreclosing to the jury any question of the credibility of the witnesses who testified as to what the grand jury was investigating or considering at the time of the alleged perjury, and of determining exactly what was under consideration or investigation.

Materiality of the allegedly perjurious statements is an essential element of the crime of perjury. Tit. 18, 1621, U. S. C.; **Hill v. U. S.** (9), 54 F. 2d 599.

Of course, the question of whether a given statement is material to a given inquiry is a question of law for the court. **U. S. v. Parker** (7), 241 F. 2d 943. But the general issue of materiality involves not only the question of what statement was made but the question of what subject was under investigation, both fact questions, and both questions clearly involving the credibility of the witnesses whose testimony was relied upon to establish them. **Weiler v. U. S.**, 323 U. S. 606. And the defendant, petitioner here, had a right to have the jury pass on them.

The quoted portion of the charge left the question of what was said by the petitioner for the jury's determination, but not the question of what the grand jury had under investigation. This was in issue by the plea.

Luse v. U. S. (9), 49 F. 2d 241, 245, covers the precise point, and in concise reasoning shows why the question of

materiality, in a perjury case, is actually a mixed question of law and fact, which must be presented to the jury as a hypothetical charge upon the factual situation which the prosecution elects to present.

Petitioner asked the District Court to follow the course charted in the **Luse** case, but the District Court refused.

On appeal, petitioner cited to the Court of Appeals the Luse case at length. The Court of Appeals did not mention it in its opinion, nor did it mention the theory of petitioner based upon it. The question was not discussed.

Petitioner believes, in the language of Rule 19 of this Court, that the Court of Appeals by its failure to consider the Luse case and its failure to reverse the action of the trial court, has so far sanctioned a departure from the accepted and usual course of proceedings as to call for an exercise of this Court's power of supervision.

6.

Validity of Grand and Petit Juries.

In determining that the grand jury before whom the petitioner testified, and the petit jury by whom he was tried, were legal bodies, both the trial and appellate courts decided certain basic problems involving federal juries contrary to the decisions of this court.

Tit. 28, §§ 1861, 1864 and 1865, U. S. C., govern the qualification, ordering and drawing of juries.

This court has held that juries are illegal where the jurors were not properly qualified or were drawn by arbitrary selection rather than by chance. **(Thiel v. Southern Pacific Coal, 328 U. S. 217; Ballard v. United States, 329 U. S. 187.)**

The combined testimony of Douglas H. Reed, Clerk, and Bolen J. Carter, Jury Commissioner, supplementing the affidavits of each such persons, provides the following uncontradicted facts with respect to the qualifications and impaneling of jurors (R. 17-26; Appellees App. 1-37; Def. Ex. 2, 3).

A. There has been no re-examination by the clerk and jury commissioner of names in the jury box for the past twelve years since the present jury commissioner was appointed.

B. The clerk culled from answered questionnaires the names of those persons whom he felt might be qualified jurors and prepared cards with the names of such jurors thereon, which were subsequently placed in the box.

C. The jury commissioner never examined the accepted or rejected questionnaires to determine if the decision of the clerk, as to the fitness or unfitness of such prospective jurors met with his approval.

D. The clerk prepared cards for a number of jurors whose names were submitted to him by third parties without having sent to such jurors a questionnaire for the purpose of ascertaining if such jurors were, in fact, qualified.

E. The number or percentage of jurors whose names have been, or now are, in the jury box and whose qualifications have never been determined, are unknown to the clerk.

F. The jury commissioner has been unaware of the actions of the clerk in placing the names of non-qualified jurors in the jury box and has never consented to such procedure.

G. The questionnaire submitted by the clerk to prospective jurors omits an essential qualification of jurors as

set forth in Tit. 28, § 1861, U. S.C., namely, "information concerning conviction in a State or Federal Court of a crime punishable by imprisonment for more than one year and without restoration of Civil Rights."

H. All court orders requesting the drawing of jurors for petit or grand juries since 1954, provided for selection of jurors within a radius of 150 miles of the place of holding court with the exception of four such orders containing no restrictive provisions.

I. The court has never directed the jury commission to maintain separate jury boxes for the different places for holding court, as provided in Tit. 28, § 1865, U. S. C., so that there would be a minimum of 300 names of qualified jurors in that portion of the district from which names of jurors were to be drawn.

J. No record of the names or the number of names in the jury box has been maintained by either the clerk or jury commissioner.

K. Juries were "drawn through a sorting process" described by the jury commissioner, in which the clerk and jury commissioner standing or sitting on opposite sides of a counter or table, would take a number of cards from the jury box, individually sorting them, including or excluding jurors thought to be within or without the designated area.

L. No cross-examination or cross-checking of the names included or excluded was made by the clerk and jury commissioner of such names, each of such persons selecting names of jurors to be included or excluded without the approval or disapproval of the other.

M. Although not specifically so ordered, the evidence reveals that the grand jury was drawn from a restricted area within one hundred fifty miles of East St. Louis by the "sorting process."

X. The petit jury was drawn by the sorting process within the restricted area by specific order of court.

In the instant case, the validity or legality of the grand jury is not a mere procedural or incidental requirement, but is a basic, substantive requirement to support the validity of the indictment.

Its validity or legality was properly raised, both by Motion to Dismiss filed prior to trial, and during the course of the trial itself under the defendant's plea of Not Guilty, as a part of his defense.

The validity or legality of the petit jury was also timely and properly raised.

How grossly may a jury commission depart from the prescribed rules for qualifying and selecting jurors? How broad is the discretion of the trial court in determining the legality of a jury? Do the same discretionary powers apply in a perjury case where the alleged false statements were uttered before the grand jury whose validity is questioned?

The validity of juries comprises an important question of federal law. The trial court in this case did not conform either to the statutory requirements, nor to decisions of this court in its determination.

The appellate court did not specifically allude to the problem.

The failure of both the trial and appellate courts to determine this important federal question in accordance with the decisions of this court, constitutes such a departure from the accepted course of judicial proceedings as to call for the exercise of this court's power of supervision.

7.

Denial of Due Process in Judicial Proceedings.

The Petitioner believes that the trial court, sanctioned by the Appellate Court, in its several rulings, both specifically and cumulatively, has so far departed from the accepted course of judicial proceedings as to deny Petitioner due process of law.

The Petitioner believes that the following actions of the trial court, cumulatively comprise a denial of due process of law.

1. The trial court refused to transfer the case for trial to a portion of the district, or to another district, in which an impartial trial might be secured (R. 11-13).

2. The trial court, despite the Petitioner's Motion to Transfer, substantiated by a mass of evidence indicating probable prejudice in the East St. Louis area, specifically ordered a trial jury to be drawn from the area near East St. Louis, instead of an area substantially beyond it (R. 34).

3. The trial court refused to permit the Petitioner to subpoena witnesses in his own behalf (R. 29-30).

4. The trial court permitted the government to subpoena, and use, witnesses which it had denied the Petitioner the right to subpoena (R. 49-67).

5. The trial court refused to permit the Petitioner the use of witnesses who might contradict the witnesses for the government (R. 29-30).

6. The trial court refused to require the government to ascertain the intent of four witnesses to claim the right not to testify under the Fifth Amendment prior to calling them as witnesses before the trial jury (R. 35-39).

7. The trial court refused to prohibit the government from calling three of four witnesses, who were expected to claim their right not to testify under the Fifth Amendment, after the first had so refused, and had been adjudged guilty of contempt (R. 99).

8. The trial court refused to permit an attorney for the Petitioner, who claimed, and whom the Petitioner claimed, might become a material witness for the Petitioner, to withdraw as attorney of record (R. 3; App. Pet. Reh. 57-62).

9. The court failed to dismiss the indictment after the Petitioner, by sworn statement contained in Motion for Continuance, corroborated by statement of his attorney, contained in Motion to Withdraw, charged the government with trickery or bad faith amounting to entrapment, and the government had failed to exonerate itself (R. 3; App. Pet. Reh. 62-70).

The Petitioner recognizes that the trial court has a wide discretion in many matters that arise in pre-trial proceedings as well as during the trial. However, the decisions under the "Due Process" clause of the Fifth Amendment indicate that such discretion is abused when exercised to the extent of depriving a defendant of a reasonable right to a fair trial.

The trial court refused to transfer the case for trial to Danville, Illinois, or to some other district.

The Petitioner, in his Motion to Transfer, made under Rule 21 (a) of the Federal Rules of Criminal Procedure, and two subsequent amendments under said Rule, disclosed to the trial court, a mass of prejudicial publicity, by press, radio and television, which would probably preclude any intelligent juror in the East St. Louis area from being impartial.

The trial court continued the case at one time because of such publicity, but refused to transfer the case.

Most of this prejudicial publicity concerned Frank Wortman and Elmer (Dutch) Dowling, the Petitioner usually being designated as their lieutenant. It was a question largely of "guilt by association."

The trial jury, with much better evidence to substantiate Count III, found the Petitioner Not Guilty on that count, but did find him guilty on the Wortman-Dowling counts.

Tit. 28, § 1865, U. S. C., contains an express provision for calling jurors from prescribed areas of the District in order to secure an impartial jury.

The trial court, being fully cognizant of the continuous barrage of prejudicial publicity against the Petitioner in the East St. Louis area, might have attempted to secure a reasonably impartial jury by ordering the panel drawn from an area beyond one hundred, or one hundred fifty, miles of East St. Louis, where such publicity was almost non-existent, or at least, from the entire District. The order, however, provided for the panel to be drawn from an area within one hundred fifty miles of East St. Louis.

Petitioner believes that due process would have required the trial court either to transfer the case, or to require that jurors be drawn from an area a substantial distance from East St. Louis.

The refusal of the trial court to permit compulsory process for the attendance of certain witnesses for the petitioner has heretofore been discussed in connection with his specific rights under the Sixth Amendment.

However, can it be "Due Process" to grant to the government the right denied to the petitioner, or having

granted it, then again to deny to the petitioner the right to call other witnesses to the same matter who might refute the testimony of those called by the government?

Petitioner has also heretofore discussed the action of the trial court in refusing to require the government to ascertain the intention of four government witnesses to claim the protection of the Fifth Amendment if called to testify.

Was it "Due Process" to permit the prosecution to parade before the trial jury four witnesses whom the government "knew" would claim their privilege under the Fifth Amendment? Was the trial court granting a "Fair Trial" to the petitioner when he refused to require the government to ascertain the witnesses' intention before calling them before the jury? Would not "Due Process" have required this action be taken, when the court was so clearly apprised of the possibility, when the witnesses were themselves under investigation, and when two of them were the key "prejudicial" parties?

And,—having refused to require the government to predetermine the intention of the witnesses, once the first of such four witnesses did claim the privilege, did the trial court then have any sound legal reason for not requiring such predetermination of the remaining three witnesses? The petitioner respectfully submits that he was denied a fair trial by the course of action so taken.

The petitioner submits that "Due Process" is denied a defendant when the court refuses to permit his attorney to withdraw from the case for good cause, and sufficient time remains before trial to permit the orderly course of trial preparation and procedure.

Ray M. Foreman was the original attorney of record for the petitioner, and remains one of such attorneys of record in this case, by order of the trial court.

As of June 19, 1959, the trial court had denied the petitioner's motions for Bill of Particulars (almost in toto) for Transfer to Danville, or another District for trial, and to Dismiss the Indictment for illegality of the Grand Jury.

On June 19, 1959, petitioner's attorney filed his written Motion to Withdraw as Attorney of Record for petitioner on the grounds that he might be called as a material witness for the petitioner, specifying in detail certain conferences with the District Attorney prior to petitioner's testimony August 10, 1956, in which petitioner was assured that he would not be indicted or prosecuted for perjury for any alleged inaccurate or erroneous statements without first being given a full and fair opportunity to clarify such statements; of additional conferences after such testimony, both with and without the presence of the petitioner, at which the partnerships were discussed but no mention made of false statements; of a conference with the United States Attorney in which petitioner's attorney was told they "had him" for perjury; of petitioner's desire to clacify the statements and the District Attorney's refusal to permit it (App. Pet. Reh. 57-62).

No objection or denial to the facts set forth in the motion was filed by the government.

The trial court arbitrarily denied the motion.

On June 22, 1959, the petitioner filed his verified Motion for Continuance, alleging substantially the same facts as appeared in his attorney's motion, and incorporating therein said attorney's motion (App Pet. Reh 62-70).

Petitioner requested time to employ "additional" counsel since the court had denied his attorney the right to withdraw, alleging that his attorney might become a material witness, and should be permitted to withdraw so as to testify without the credibility restrictions imposed upon an attorney of record in the case.

The government did not file any denial or objections to the factual statements set forth in the motion.

The trial court continued the case until September 28, 1959, for trial, to permit the petitioner to employ additional counsel.

The trial court then recalled the Motion to Withdraw, since the petitioner was not in court on June 19, 1959; reconsidered the motion, and again denied the Motion to Withdraw.

The government has contended that such Motion to Withdraw was granted. This is not the case. On June 23, 1956, at the hearing on the Motion for Continuance, the court stated that he would continue the case and permit the withdrawal. However, he then specifically reconsidered the Motion to Withdraw and again specifically denied it. No order was ever entered permitting such withdrawal as an attorney of record. Both petitioner and his attorney so understood the court's ruling (App. Ans. Pet. Reh. 11).

The effect of this action by the trial court was to deny the petitioner both the effective assistance of counsel, and the use of a material witness subject to the usual standards or tests of credibility, instead of a witness whose testimony could, by instruction of the court, be almost completely discredited.

The courts have long recognized the duty of an attorney to withdraw from a case if he might become a material witness, and his client desires it.

Having granted petitioner three months within which to employ other counsel, "Due Process" would appear to have required the court to grant the motion to withdraw so as to release his attorney from the harsh rules or tests of credibility imposed upon an attorney of record.

Petitioner submits that the foregoing actions of the trial court, sanctioned by the appellate court, constitute a denial of due process, and call for consideration by this court.

CONCLUSION.

Wherefore, your petitioner prays that this Court issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX "A".

OPINION OF COURT OF APPEALS.

In the
United States Court of Appeals
For the Seventh Circuit.

No. 12929 September Term, 1959—April Session, 1960.

United States of America,
Plaintiff-Appellee,
v.
George Sam Magin,
Defendant-Appellant.

Appeal from the United States District Court, Eastern District of Illinois.

June 10, 1960

Before Duffy, Knoch and Castle, **Circuit Judges.**

Duffy, **Circuit Judge.** Defendant was indicted and tried before a jury for alleged violation of Title 18, U. S. C., § 1621,[1] by the giving of false testimony before a grand jury. Defendant was found guilty as to Counts I and II of the indictment, and not guilty as to Count III.

[1] "Whoever, having taken an oath * * * that he will testify * * * truly, * * * willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury. * * *"

Proof in this case showed that the defendant, Magin, Frank Wortman and Elmer Dowling had been interested together in certain enterprises from 1951 to 1955, inclusive. These ventures and the respective interests therein, will now be described.

In 1951, there was in operation in southern Illinois, a gambling venture known as the Cash Sales Company. Its capital investment was supplied by thirteen persons who held the participating shares. One was Frank Wortman who held a 14% interest; another was Elmer Dowling who held a 13% interest, and the defendant held a 5% interest.

In 1951, there was in operation in southern Illinois the Club Ville which was also a gambling venture. Eight persons held participating shares therein. One was Frank Wortman who held a 20% interest; another was Elmer Dowling who held a 15% interest, and the defendant who held a 5% interest.

Another gambling venture operated in southern Illinois in 1951 was known as the Empire Club. Nine persons held participating shares. Frank Wortman held a 22½% interest; Elmer Dowling, a 15% interest, and the defendant, a 5% interest.

In 1952, a gambling venture known as the 7800 Club was in operation. One of the nine holding participating shares was Frank Wortman who held a $2500 interest; another was Elmer Dowling who held a $1750 interest, and the defendant who held a $500 interest.

In 1952, 1953 and 1954, there was in operation in southern Illinois a gambling venture known as the R.R. Club. Its capital changed over the course of its operation, but at all times was credited to nine persons, among them being Frank Wortman, Elmer Dowling and the defendant.

In 1955, there was in operation in southern Illinois a gambling venture known as the Junction "T" Club. One

of the eight shareholders was Frank Wortman who held a 32½% interest; another was Elmer Dowling who held a 17½% interest, and the defendant who held a 10% interest.

The defendant was subpoenaed to testify as a witness before the grand jury. He testified he had met Buster (Frank) Wortman nine years previously, and when asked if they were close friends, stated that Wortman was a friend and neighbor. Defendant was asked the following questions before the grand jury, and he answered as stated:

"Q. Are you interested in any business, corporation, partnership or association with Mr. Wortman?

"A. No, sir.

"Q. None?

"A. No, sir.

"Q. Have you ever been?

"A. No, sir."

Defendant then testified that he had known Mr. Dowling for three or four years and the following questions and answers appeared:

"Q. Have you ever had, or do you now have, any business connection either as a partner or associate in any association, partnership or corporation with Elmer Dutch Dowling?

"A. No, sir.

"Q. Have you ever been a partner with Dutch Dowling?

"A. No, sir, never.

"Q. You have told us before you had never been connected with Frank Wortman in any business association?

"A. That's right.

"Q. Of any kind?

"A. Never have."

The grand jury before which defendant appeared was investigating, among other things, the alleged attempts to evade personal income taxes and wagering taxes on the part of Frank Wortman, Elmer Dowling, defendant Magin and others, with particular reference to gambling enterprises known as Cash Sales Co., R. R. Club, 7800 Club, the Empire Club, and others.

Defendant asserts error by the trial court in denying motions for acquittal, and on this ground seeks a reversal of the judgment of conviction, with remandment accompanied by an instruction to the District Court to enter a judgment of acquittal. Defendant also asserts error in a number of respects by reason of which he claims he is entitled to a new trial. Among such grounds of error are: denial of a pretrial motion for leave to subpoena the grand jurors; denial of a pretrial motion requesting an inquiry, out of hearing of the jury, as to whether certain witnesses for the government would invoke the Fifth Amendement if placed on the stand; admission of certain evidence; refusal to give certain instructions requested by defendant, and the giving of certain instructions which were objected to by the defendant; refusing an offer of proof.

Defendant argues that it is not the contradiction between oath and fact that the law denounces as perjury, but the difference between oath and belief. The Government admits that merely proving the statements were false would not be sufficient to convict for perjury because the additional element that defendant knew the statements were false is a necessary element of proof.

The trial court correctly stated the governing principle in the following instruction to the jury: "Even if you believe, ladies and gentlemen, beyond a reasonable doubt that the defendant and Frank Wortman and Elmer Dowl-

ing were partners or owned shares in the same syndicate or syndicates at the times mentioned in the evidence, and that the defendant under oath denied that this was so, this would still be insufficient in itself to warrant conviction * * *. You would further be required to find and believe beyond a reasonable doubt that at the time of his denial under oath the defendant knew and believed such fact."

The degree and character of proof required in a perjury prosecution is different than in an ordinary criminal case. It is clear that there are two essential elements of proof. First, the statements made by the defendant must be proven false. Secondly, it must be proven that the defendant did not believe these statements to be true. It is clear that the objective falsity of the statements made must be established in conformity with the "two witness rule" which is peculiar to perjury prosecutions. Briefly stated, that rule requires "direct" proof of the falsity of the statements made by the testimony of two witnesses or by the testimony of one witness plus corroborating circumstances. In effect, the rule thus prohibits conviction on the basis of the testimony of one witness. Thus the Supreme Court stated in **Hammer v. United States**, 271 U. S. 620, 626:

> "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury."

This statement was reaffirmed in **Weiler v. United States**, 323 U. S. 606.

The defendant, in the case at bar, does not argue that this rule was not satisfied as to the first element; that is, the objective falsity of the statements made. Indeed, he concedes that the statements were, in fact, false. However,

he contends that this rule is also applicable to the second element. Thus he argues that the Government must prove that he did not believe his statements to be true in conformity with the two witness rule.

There is a conflict of authority as to the applicability of the two witness rule to the second element of perjury, the belief of the defendant in the truth of his statements. We think the better rule was well stated in the case of **Young v. United States**, 212 F. 2d 236 (D. C. Cir., 1954), cert. den. 347 U. S. 1015, where the Court said at pages 240, 241:

> "* * * To return a verdict of guilty on a charge of perjury a jury must, of course, be convinced, beyond a reasonable doubt, not only that the accused testified falsely but that he did not, at the time, believe his testimony to be true. The first inquiry in a determination of whether or not the evidence was sufficient for the jury to find an accused guilty of perjury relates to the application of the 'two witness rule.' This rule is misnamed. It does not require the testimony of two witnesses. Properly stated it is that 'the uncorroborated oath of one witness is not enough to establish, for purposes of conviction of perjury, the falsity of sworn testimony.' (Citations omitted.) * * * We think the evidence offered on the first count satisfies the rule.
>
> "Fulfillment of the two witness rule is necessary for conviction of perjury. It is not, however, sufficient for conviction. An additional requirement is that the jury could reasonably believe that there was no reasonable doubt as to defendant's guilt. (Citations omitted.) This requirement, of course, relates to both elements of perjury: the falsity of the testimony and the lack of a belief in its truth. Generally, a belief as to the falsity of testimony may be inferred by the jury from proof of the falsity itself. * * *"

The above language was quoted with approval by this Court in the case of **United States v. Parker**, 244 F. 2d 943, 950, 7 Cir., 1957.

Both sides cite **American Communications Association v. Douds**, 339 U. S. 382 (1950). This case requires a close analysis. It was not a criminal case, but the court was there construing the non-communist affidavit provision of the Labor Management Relations Act of 1947. The Court stated, at pages 410 and 411:

> "Insofar as a distinction between beliefs and political affiliations is based upon absence of any 'overt act' in the former case, it is relevant, if at all, in connection with problems of proof. In proving that one swore falsely that he is not a Communist, the act of joining the Party is crucial. Proof that one lied in swearing that he does not believe in overthrow of the Government by force, on the other hand, must consist in proof of his mental state. To that extent they differ.
>
> "To state the difference, however, is but to recognize that while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does. Of course we agree that the courts cannot 'ascertain the thought that has had no outward manifestation.' But courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred. See 2 Wigmore, Evidence (3rd ed.), §§ 244, 256 et seq. False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind. In the absence of such manifestations, which are as much 'overt acts' as the act of joining the Com-

.munist Party, there can be no successful prosecution for false swearing."

A casual reading of this language might lead to the interpretation that "direct" evidence was an essential element of proof of the second element of perjury. However, it is clear the Court was not discussing the second element, that is, the defendant's knowledge of the falsity of the statement. The Court was referring to the first element, that is, the actual falsity of the statement. In the language quoted, the Court was directing its attention to the requirement that officers of a labor organization must file affidavits that they do not believe in the overthrow of the Government of the United States by force. In any prosecution arising from the filing of false affidavits, the first element to be proven would be that the statements made in the affidavits were false. If such a defendant in a criminal case did not believe in the overthrow of our Government by force, the prosecution for perjury would be dismissed because the first element essential to such a prosecution would be absent.

It is quite clear that in the **Douds** case, the Supreme Court was not extending the two witness rule to the second element in perjury. The confusion arises from the fact that in such a case, the false statement itself is a statement of what the witness believed. In the ordinary perjury prosecution, such as the case at bar, the false statement is not a statement of belief, but rather, a false statement of some objective fact. Thus, in the case at bar, the element of belief enters into the case only in proving the second element of perjury which was that the defendant knew when he made the statement that it was not true.

Defendant cites **United States v. Remington**, 2 Cir., 191 F. 2d 246. It is true that in this case the Court held the two witness rule applied to the second element of a perjury prosecution. However, the Court reached this result

in reliance upon the Supreme Court's opinion in **Douds**. It construed the **Douds** case as extending the two witness rule to the second element of perjury prosecutions. For the reasons heretofore stated, we think such an interpretation is erroneous.

Defendant insists that in no case can there be a conviction of perjury if circumstantial evidence is necessary to establish the intent and belief of the accused at the time he testified under oath. We think, however, that strong and convincing circumstantial evidence may prove the intent to falsify just as circumstantial evidence can be used in other criminal cases to establish guilt of an accused beyond a reasonable doubt.

On the question of intent in the case at bar, the jury was entitled to consider with other evidence, defendant's income tax returns showing income from various gambling enterprises in which Wortman and Dowling had substantial interests; that such common interests extended over a period of five consecutive years; that Wortman and defendant were friends and neighbors, and had been such for some nine years. The very fact these enterprises in which defendant, Wortman and Dowling had mutual interests, were unlawful, would necessarily mean that any meetings of those interested would be in secret. It would indeed strain a juror's credulity to the breaking point to believe that one who had been associated with a relatively small group in a number of unlawful endeavors for a period of five years, did not know those associated with him.

We shall now consider some of the allegations of error which defendant asserts entitle him to a new trial.

Defendant made a pretrial motion to subpoena the twenty-three grand jurors, the United States Attorney, and the two Assistant United States Attorneys who had

actively assisted the grand jury. Defendant points out that the Sixth Amendment provides that a defendant in a criminal prosecution may have compulsory process for obtaining witnesses in his favor. We do not know of any federal court decisions directly in point.

There can be no possible error as to Maag and Morris, the two Assistant United States Attorneys. They testified at the trial and were subjected to a vigorous cross-examination both as to defendant's testimony before the grand jury and the subject matter of the investigation by the grand jury. The foreman of the grand jury who administered the oath to defendant, was likewise a witness at the trial, and was also subjected to a broad cross-examination.

Defendant made no attempt in his motion to show a need for the testimony of the grand jurors. The policy of secrecy as to federal grand jury proceedings is well known. To permit the unlimited interrogation of grand jurors as to what transpired during the course of their investigation, is tantamount to permitting inspection of the grand jury minutes. It is established that the burden is on the defense to show that a particularized need exists for the minutes which outweighs the policy of secrecy **Pittsburgh Plate Glass Company v. United States**, 360 U. S. 395, 400. We hold there was no error in the trial court's refusal to grant the request for the subpoena of the grand jurors and the United States Attorney and his assistants.

Defendant's motion for a hearing on whether certain prospective witnesses for the Government would claim the privilege against self-incrimination, was made after the selection of the jury had been completed. Defendant had made nine previous motions at various intervals before the trial. Six hearings had been held. The hearing demanded by defendant would have delayed the trial. Furthermore the trial court gave a proper cautionary instruction.

Defendant has cited cases where judgments of conviction were reversed because of alleged error in calling witnesses who claimed the privilege against self-incrimination. But, in none of these cases had a proper cautionary instruction been given by the Court. On the other hand, in cases such as **United States v. Hiss**, 2 Cir., 185 F. 2d 822, 831, 832, and **Weinbaum v. United States**, 9 Cir., 184 F. 2d 330, 331, Courts of Appeals have refused to reverse on that ground. Under the circumstances of this case, we hold the refusal to order a hearing was not error.

We have considered each of the other assignments of error. We find them to be without merit.

The judgment of conviction is

Affirmed.

A true copy.

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States, Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Tit. 18, § 1321, U. S. C.:

"Whoever, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition or certificate, by him subscribed, is true, willfully and contrary

to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

Tit. 28, § 1732, U. S. C.:

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in regular course of any business and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business', as used in this section, includes business, profession, occupation and calling of every kind.

"(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may

be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence."

Tit. 28, § 1733, U. S. C.:

"(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

"(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the original thereof."

Tit. 28, § 1861, U. S. C.: "Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities, to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.

Tit. 28, § 1864, U. S. C.: "The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines."

Tit. 28, § 1865, U. S. C.: (a) Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. To this end the court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place.

(b) Grand or petit jurors summoned for service at one place for holding court in a district may, if the public convenience so requires and the jurors will not be unduly burdened thereby, be directed to serve at another place in the same district.

APPENDIX C.

JUDGMENT.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
Friday, June 10, 1960

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle Circuit Judge

United States of America, Plaintiff-Appellee, vs. George Sam Magin, Defendant-Appellant. No. 12929	Appeal from the United States District Court for the Eastern District of Illinois.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the Opinion of this Court filed this day.

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JAMES R. BROWNING, Clerk

No. 411

In the Supreme Court of the United States

OCTOBER TERM, 1960

GEORGE SAM MAGIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 43-53) is reported at 280 F. 2d 74.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1960 (Pet. 58). A petition for a rehearing was denied on July 25, 1960. On August 18, 1960 Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including September 13, 1960. The petition was filed

on September 12, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the element of intent in perjury cases must be proved by direct evidence.

2. Whether the trial court improperly denied petitioner's motion to subpoena grand jurors and government attorneys.

3. Whether petitioner was prejudiced by the fact that former associates of his, called as witnesses by the government, claimed their privilege against self-incrimination, when the trial court instructed that the jury was not to consider such claims as evidence against the defendant.

4. Whether the grand and petit juries were drawn in compliance with 28 U.S.C. 1864 and 1865.

5. Whether there were errors at the trial.

STATUTES INVOLVED

18 U.S.C. 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined

not more than $2,000 or imprisoned not more than five years, or both.

28 U.S.C. 1861 provides:

Qualifications of Federal jurors

Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak, and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

28 U.S.C. 1864 provides in relevant part:

Manner of drawing; jury commissioners and their compensation

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

* * * *

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

This section shall not apply to the District of Columbia.

28 U.S.C. 1865 provides in relevant part:

> *Apportionment within district; additional jury commissioners*
>
> (a) Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial; and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. To this end the court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place.
>
> * * * * *

STATEMENT

A four-count indictment returned December 12, 1956, in the United States District Court for the Eastern District of Illinois, charged petitioner with perjury, in violation of 18 U.S.C. 1621, growing out of his testimony before a federal grand jury. After some six pretrial hearings granted by the court in its consideration of petitioner's nine pre-trial motions (including a motion to subpoena grand jurors and a motion attacking the validity of the grand jury returning the indictment) (App. 1-4, 15-17, 29-30),[1] petitioner went to trial on September 28, 1959 on three counts of the indictment[2] (App. 5, 35, 39). He

---

[1] Unless otherwise indicated, "App." refers to the appellant's appendix in the court below.

[2] The fourth count of the indictment was dismissed on October 22, 1958 upon motion of the government (App. 2).

was found guilty on counts 1 and 2 (App. 143) and was sentenced to three years' imprisonment and fined $2000.00 (App. 168-169). The Court of Appeals affirmed.

A. The Evidence as to Counts 1 and 2

Count 1 of the indictment charged that petitioner, while under oath before a grand jury, wilfully testified falsely, on August 10, 1956, that he had never had business connections, as partner or associate, with Elmer "Dutch" Dowling (App. 7-8). Count 2 charged that petitioner falsely testified on the same date he had never had business connections with Frank Wortman (App. 9-10).

The foreman of the grand jury and two Assistant United States Attorneys assigned to the jury testified that petitioner appeared there as a witness in an investigation of alleged income and wagering tax violations by petitioner, Dowling, Wortman and others (App. 49-67). Both Assistant United States Attorneys testified (App. 59, 65), and a court reporter introduced a partial transcript of the hearing to show (App. 80-82), that petitioner at that time denied having, or ever having had, any business associations with Dowling and Wortman. The transcript also showed that petitioner testified that he had known Wortman, a friend and neighbor, for nine years and that he had known Dowling for three or four years (App. 81).

The government introduced, through an internal revenue district tax collector, a number of federal income tax returns for the years 1951-1955 (App. 90-93). These included personal returns of peti-

tioner and his wife, bearing their signatures, and further identified by the accountant who prepared them (App. 110), which reflected petitioner's receipts of dividends from six partnerships (described at trial as gambling ventures). The government also introduced income tax returns of the partnerships so listed by petitioner. These returns, which were not signed by petitioner, showed the partners in the ventures to be petitioner, Wortman, Dowling and others. Most of the partnership returns were prepared by the same accountant who prepared petitioner's returns (App. 110). Both the partnership and personal returns revealed that petitioner's earnings ran as high as $19,000 in one year from one venture (App. 91, 93).

The government also introduced business records of the partnerships, through the accountants who kept them (App. 101, 112-119). These records likewise showed that petitioner held mutual interests in these ventures with Wortman, Dowling and others. The number of participants in each venture was eight or nine persons (with the exception of one venture in which there were thirteen persons). Petitioner's interest was generally 5%, although in one instance it was 10%; the respective interests of Wortman and Dowling ranged from 13% to 32½%.

B. The Court's Instructions

The court, after giving a lengthy charge as to reasonable doubt and the elements of the offense (App. 129-134), instructed that a conviction of perjury must be based upon the testimony of two witnesses or that of one witness corroborated by other

substantial evidence (App. 135). It explained that the evidence in the crime of perjury must be direct and positive as distinguished from circumstantial (App. 135). It continued (App. 135-136):

> Even if you believe, Ladies and Gentlemen, beyond a reasonable doubt that the defendant and Frank Wortman and Elmer Dowling were partners or owned shares in the same syndicate or syndicates at the times mentioned in the evidence, and that the defendant under oath denied that this was so, this would still be insufficient in itself to warrant conviction under Counts I and II of the indictment. You would be required further to find and believe beyond a reasonable doubt that at the time of his denial under oath the defendant knew and believed such fact.
>
> * * * *
>
> This is because the laws of the United States do not condemn and punish as perjury the making of a statement, even under oath, simply because it is contrary to objective fact. They require, in addition, knowledge on the part of the defendant and a belief by him contrary to his statement, and the burden is upon the government to prove that knowledge and belief beyond a reasonable doubt.
>
> The question of intent is a matter for you, as jurors, to determine, and, as intent is a state of mind and it is not possible to look into a man's mind to see what went on, the only way you have of arriving at the intent of the defendant in this case is for you to take into consideration all of the facts and circumstances shown by the evidence, including the exhibits, and determine from all such facts and circumstances what the intent

of the defendant was at the time in question. Thus, direct proof of willful or wrongful intent or knowledge is not necessary. Intent and knowledge may be inferred from acts and such inferences may arise from a combination of acts, although each act standing by itself may seem unimportant. These are questions of fact to be determined from all the circumstances.

ARGUMENT

1. Petitioner, relying primarily on an alleged conflict with *United States* v. *Remington*, 191 F. 2d 246 (C.A. 2), certiorari denied, 343 U.S. 907, contends (Pet. 17-21) that the "two witness" rule of proof in perjury cases applies not only to the falsity of the statement, but also to the defendant's knowledge or belief that it was false. This is not, and has never been, the law, and the court below correctly held that the jury was properly permitted to infer that petitioner believed that his testimony was false, without any direct proof of such belief. The court below, however, misinterpreted the *Remington* case as holding to the contrary.

Subjective elements of a crime pertaining to the state of a man's mind, such as intent, knowledge, belief, and recollection, must of necessity be proved by circumstantial evidence. Even in the case of treason, where the requirement that the overt act be proved by two witnesses is imposed by the Constitution, the mental state of disloyalty, of adherence to the enemy, may be established by circumstantial evidence. *Cramer* v. *United States*, 325 U.S. 1, 30-35; *Haupt* v. *United States*, 330 U.S. 631, 644-646. A

fortiori, in the case of the less serious offense of perjury, where the "two witness" rule was judicially created (see *Weiler* v. *United States*, 323 U.S. 606, 608-610), the defendant's subjective state of mind may be established circumstantially. Indeed, to require direct evidence that the defendant believed that his statement was false would make it virtually impossible ever to obtain a conviction for perjury. Thus the courts of appeals have not required that the intent element of perjury be shown by direct evidence, but have permitted it to be proved circumstantially. *E. g.*, *Young* v. *United States*, 212 F. 2d 236 (C.A. D.C.) certiorari denied, 347 U.S. 1015; *United States* v. *Rose*, 215 F. 2d 617 (C.A. 3); *United States* v. *Parker*, 244 F. 2d 943, 950 (C.A. 7); see *United States* v. *Wood*, 14 Pet. 430, 439.

The Court of Appeals misinterpreted *United States* v. *Remington*, *supra*, as holding that the "two witness" rule also applies to proving that the defendant believed that his statement was false. Although the court in *Remington* stated that the crime of perjury consists in the contradiction between the accused's oath and his belief (191 F. 2d at 249), it further pointed (*ibid.*) out that the only "direct" evidence that the defendant did not believe the truth of what he swore would be "his own [written] declarations of his belief." Since, however, perjury prosecutions are not limited to this kind of proof, the court concluded (*ibid.*):

> Hence it must be that the rule peculiar to perjury as to the character of the proof, means that it is the facts from which the jury may

> *infer* the accused's state of mind that must be proved by "direct" evidence. And this view is confirmed by Chief Justice Vinson's opinion in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 411, * * * where it is said: "* * * while objective facts may be proved directly, the state of a man's mind must be *inferred* from the things he says or does. * * *" [Emphasis added.]

In other words, *Remington* held only that the government must show by direct evidence that the defendant did or said certain things, from which the jury may infer that he intended to swear falsely. It did not hold, however, that the defendant's belief that his testimony was false need be established by direct evidence.

In the instant case, the government introduced substantial direct evidence from which the jury properly inferred that petitioner intended to testify falsely. The evidence was documentary, emanated from the accused and had the characteristics of written declarations. See *United States* v. *Wood*, 14 Pet. 430, 439. The personal income tax returns of petitioner showed that he collected substantial income over a period of five consecutive years from the various gambling ventures in which Wortman and Dowling had interests. Moreover, and independently, petitioner's testimony before the grand jury established that he had known Dowling for three or four years and that Wortman had been his friend and neighbor for nine years. These are the direct facts from which the jury was fully warranted in inferring knowledge of falsity. As the court below noted (Pet. 51), it would "strain a juror's credulity

to the breaking point to believe that one who had been associated with a relatively small group in a number of unlawful endeavors for a period of five years, did not know those associated with him," some of whom were his friends or neighbors.[3]

2. There is no merit to petitioner's argument (Pet. 22-23) that the trial court erred in denying his pretrial motion to subpoena the grand jurors and the government attorneys who heard his perjured testimony. The argument is that such witnesses could have testified to facts bearing on the materiality of the false testimony and on whether petitioner made the statements charged. But petitioner had been furnished a transcript of his entire grand jury testimony before he made the motion (App. 2, 71) and he has never denied making the statements. Although the burden of proof was of course on the government to show materiality, this required only a showing that the false statements had the natural effect or tendency to impede the investigation. *United*

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[3] The other cases that petitioner cites as in conflict with the decision below (Pet. 17) are clearly distinguishable. In some of those cases, perjury convictions were reversed because the evidence did not justify the inference of intent to swear falsely; they were not reversed because the evidence of intent was circumstantial rather than direct. See, *e.g.*, *Fotie* v. *United States*, 137 F. 2d 831 (C.A. 8); *Beckanstin* v. *United States*, 232 F. 2d 1 (C.A. 5); *United States* v. *Nessanbaum*, 205 F. 2d 93 (C.A. 3); *United States* v. *Rose*, 215 F. 2d 617 (C.A. 3). In *Fotie*, *supra*, the court observed: "Necessarily the recollection of a witness must be shown by circumstantial evidence" (137 F. 2d at 842). *United States* v. *Alu*, 246 F. 2d 29 (C.A. 3), turns not upon proof of intent, but upon proof of the underlying facts necessary to establish that the testimony was false.

States v. *Alu*, 246 F. 2d 29 (C.A. 2); *Dolan* v. *United States*, 218 F. 2d 454 (C.A. 8), certiorari denied, 349 U.S. 923. The government met that burden here. Two Assistant United States Attorneys and the foreman of the grand jury testified and were cross-examined by petitioner, as to the subject matter of the grand jury's investigation. Petitioner's suggestion that other jurors might have testified differently as to the purpose of the investigation is pure speculation. After the government's case was in, petitioner did not renew his request. He did not then and does not now point to anything elicited on cross-examination nor to any other evidence which would show a basis for a reasonable belief that there would be contrary evidence from other jurors. In those circumstances, petitioner has not made a sufficient showing to warrant a departure from the traditional policy of secrecy surrounding grand jury proceedings. See *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, 400; *United States* v. *Rose*, 215 F. 2d 617, 628 (C.A. 3); *United States* v. *Remington*, 191 F. 2d 246, 251 (C.A. 2), certiorari denied, 343 U.S. 907.

3. At the beginning of trial, after the selection of a jury, petitioner moved for a hearing to determine, out of the presence of the jury, whether Wortman, Dowling, and two other witnesses, all under subpoena by the government, would claim the privilege against self-incrimination (App. 35-36). At the argument on the motion, government counsel stated that Wortman and Dowling were material witnesses and that he had never examined them (App. 37). He noted

that the other two witnesses had not claimed the privilege before the grand jury or at any other time, and indicated that his examination of them would be no greater in scope than it was before the grand jury (App. 37). The court, after recessing to study the question, denied the motion (App. 39).

At trial the four witnesses did claim the privilege. The court instructed the jury (App. 137) that this fact could not be considered in any way as evidence, or in any way as militating against the defendant or as relieving the government of its burden of proving every element of the offense beyond a reasonable doubt. It charged (*ibid.*) that the privilege against compulsory self-incrimination was the right of every person guaranteed by the Constitution and that its exercise by one person could not be employed by the prosecution to create an inference that another person may be guilty of crime.

In view of the fact that two witnesses had talked freely before the grand jury and that the other two had never been examined, petitioner's suggestion that government counsel acted in bad faith (*i.e.* that government counsel knew the witnesses would claim the privilege (Pet. 24-28)) has no factual basis. The government, therefore, had no reason to refrain from calling the witnesses. And in view of the trial court's instructions, and the strong evidence of guilt, petitioner could not have been prejudiced by the claims. See *Weinbaum* v. *United States*, 184 F. 2d 330, 331 (C.A. 9); *United States* v. *Hiss*, 185 F. 2d 822, 831-832 (C.A. 2), certiorari denied, 340 U.S. 948.

4. Prior to trial petitioner filed a motion to dismiss the indictment (App. 15-17), in which he alleged that the grand jury which returned the indictment (as well as the grand jury before which he allegedly testified falsely under oath)[4] was not a legally constituted body. He alleged that, contrary to the requirements of 28 U.S.C. 1864 (*supra*, p. 3), the names of the grand jurors had not been publicly drawn from a jury box containing the names of at least 300 qualified persons, which had been placed there alternately by the Jury Commissioner and the Clerk of Court. The court, after a full hearing at which it heard testimony from the Clerk of Court and the Jury Commissioner, concluded in a comprehensive opinion (see Appendix for Appellee, pp. 38-47) that not only was the motion untimely filed under Rule 12 of the Federal Rules of Criminal Procedure and its local Rule 27, but that the evidence conclusively showed that the grand jury had been drawn in strict compliance with 28 U.S.C. 1864.[5] The Court

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[4] The indictment was returned by a grand jury sitting in December 1956 which had been drawn in accordance with the order of the court on July 23, 1956. The grand jury which heard the perjured testimony sat on August 10, 1956.

[5] The transcript of the hearing appears at pp. 1-37 of the Appendix for the Appellee. This testimony is reviewed in detail in the court's opinion (see *id.*, pp. 43-46). In substance it is as follows:

The Clerk of the Court testified that the Jury Commission, composed of himself and the Commissioner, used questionnaires as well as information secured from acquaintances in contacting prospective jurors; that only the names of those qualified persons were written on the cards placed in the jury box alternately by him and the Commissioner; that he

of Appeals without discussion found the issue to be lacking in merit (Pet. 53).

(a) Petitioner here renews his contention that the jurors were unqualified or improperly selected. It has no substance.[8]

Qualifications of jurors are set forth in 28 U.S.C. 1861 (p. 3, *supra*). It provides that any United

---

checked the box two or three times a year to insure that sufficient names were in the box and that there had at all times been more than 300.

The Clerk further testified that the grand jury which had returned this indictment had been drawn by him and the Commissioner from the entire district and that this time, as all other times, the drawing was public.

The Jury Commissioner testified that since the filing of petitioner's motion he had counted the cards in the jury box and found many more than 300; that his earlier statement in an affidavit filed by petitioner implying the contrary was inaccurate; that the affidavit had been drawn up and presented to him for his signature by defense counsel at a time when he was busy and he had not read it carefully.

Both officials testified that, where court orders directed the selection of jurors from restricted areas of the district, they, in publicly drawing names from the box, lay aside those names of persons whom they knew not to reside in the restricted area.

[8] While discussing the question on the merits, we also rely on the ruling of the district court that the petitioner waived his right of challenge by late presentation with no showing of cause for delay. Rule 12, Federal Rules of Criminal Procedure.

Petitioner was indicted on December 6, 1956. At the time of his arraignment on December 11, 1956, the court granted leave to file motions on or before December 31, 1956. While numerous motions were filed by petitioner during 1957 and 1958, it was not until May 8, 1959, twenty-nine months after arraignment, that the motion attacking the validity of the grand jury was filed (App. 1-2).

States citizen at least 21 years old with a residence of one year within the judicial district is competent to serve, unless he has been convicted of a felony or is physically or mentally incapacitated (p. 3, *supra*). The statute prescribes no special method for determining such qualifications; it does not specify who among jury officials shall make the determination. It provides merely that the names of such qualified persons shall be placed in a box alternately by the Clerk and the Commissioner without reference to party affiliation until the box contains 300 names or more, with replenishment from time to time. 28 U.S.C. 1864 (p. 3, *supra*). Beyond this, and the requirement that the drawing of names of jurors from the box be public, the method of selection is left to the discretion of the Clerk and the Commissioner, limited only by the requirement that the method be one designed to make the jury "a cross-section of the community" and "truly representative of it," a matter not raised here. See *Glasser* v. *United States*, 315 U.S. 60, 86; *Ballard* v. *United States*, 329 U.S. 187, 191; *Dow* v. *Carnegie-Illinois Steel Corp.*, 224 F. 2d 414 (C.A. 3), certiorari denied, 350 U.S. 971.

In the light of these provisions, it is apparent that even were petitioner's so-called "uncontradicted facts" (Pet. 33-35), some of which are not borne out by the record, accepted as true, they would not show the invalidity of the jury. Thus the use or non-use of questionnaires to select qualified jurors is *per se* irrelevant. See *Dow* v. *Carnegie-Illinois Steel Corp.*, *supra*, 224 F. 2d at 428. It does not matter that the

Commissioner did not examine the returned questionnaires. The important fact is, and this is borne out by the evidence, that only the names of qualified persons were placed in the box. The Clerk testified that jury cards were made only for those persons found to be physically competent or non-exempt by information secured through answers to questionnaires or, upon a few occasions, information secured from acquaintances familiar with the required qualifications (App. for Appellee 3, 4). In this regard, the testimony of the Clerk was that forms specifically requesting information as to conviction for criminal offenses were examined before jury cards were placed in the box (App. for Appellee 19, 20, 24).

It is likewise immaterial that no independent record of the names in the jury box was kept or that the names were not re-examined by the Commissioner. The statute does not contemplate that jury officials maintain constant surveillance over the physical, mental and residential status of persons whose names are in the box. *United States* v. *Brandt*, 139 F. Supp. 362 (N.D. Ohio). It requires only that the number of names be kept at no less than 300. The testimony of the Clerk was unequivocal that he counted the cards two or three times a year and that there were always more than 300 names in the box (App. for Appellee 6, 7, 21).

As to the drawing of names from the jury box, the record is clear that this was done publicly in compliance with the statute (App. 20-21; 28 U.S.C. 1864, p. 3, *supra*). What petitioner refers to as a "sorting process" is merely the practice by which

the Clerk and the Commissioner, in special instances where the court ordered selection from specified areas of the district (28 U.S.C. 1865, p. 4, *supra*), would, in drawing, lay aside cards bearing names of those persons not within the specified area. The maintenance of separate jury boxes is not required in such instances. The language of Section 1865 is permissive and discretionary that the court under such circumstances "*may direct* the maintenance of separate jury boxes *for some or all of the places for holding court*" (emphasis added). Moreover it should be noted that the evidence shows that here the grand jury was drawn not from a particular area but from the entire district (Apps for Appellee 19).

(b) Petitioner further attacks the validity of the petit jury, as he did prior to trial by motion to quash panel or venire (App. 31-33), on the ground that the court's order directing selection from a designated part of the district so as to conserve transportation expenses was not consistent with the requirement of an impartial trial. See 28 U.S.C. 1865, p. 4, *supra*. But the court had upon two previous occasions found no merit in general assertions that, because of adverse publicity regarding petitioner's character and associations, petitioner could not have a fair trial within the district (App. 15, 29). There is no showing that this was an abuse of discretion. See *Kersten* v. *United States*, 161 F. 2d 337, 339 (C.A. 10); certiorari denied, 331 U.S. 851; *Shockley* v. *United States*, 166 F. 2d 704, 709-710 (C.A. 9), certiorari denied, 334 U.S. 850; *United States* v. *Moran*, 236 F. 2d 361, 362 (C.A. 2), certiorari denied, 352 U.S. 909.

5. The various other claims of error are without merit.

(a) The record refutes the allegation that defense counsel, who claimed he might be a defense witness, was not permitted to withdraw as attorney of record. Attached to the government's answer to the petition for rehearing in the court below is the record at the hearing on June 23, 1959, when the case was set for trial in September. On June 19, the court had denied the motion of counsel to withdraw. A further motion to withdraw was made on June 23 together with a motion for continuance to enable defendant to get another attorney. The court pointed out that if counsel withdrew he would not be permitted to sit at counsel table, and asked petitioner if he understood that and would retain other counsel. When petitioner replied affirmatively the court continued the case until September. The court specifically said (Appellee's Answer to Pet. for Rehearing, p. 10) "You understand, Mr. Foreman, you are not to participate as attorney and not to participate in the trial of this case." Counsel replied that he so understood. There was then discussion as to the prior denial of the motion to withdraw on June 19, when petitioner had not been present. The court set aside the order of June 19 and granted the United States Attorney's motion that counsel's motion of June 19 be stricken in "view of Mr. Foreman's withdrawal" (*id.*, p. 11). Mr. Foreman did not try the case and was excluded as a witness.

(b) The court's charge was fair. The quantum of proof rule of perjury cases was adequately stated

(see Pet. 20); App. 135; *supra*, pp. 7-8). The instruction that the allegedly perjurious statements, if made, were material to the matter being investigated was proper. Materiality is a question of law for the court. *Sinclair* v. *United States*, 279 U.S. 263.

(c) The income tax returns and the business records made in the regular course of business were properly admitted into evidence. 28 U.S.C. 1732, 1733. *Arena* v. *United States*, 226 F. 2d 227 (C.A. 9); *Stillman* v. *United States*, 177 F. 2d 607 (C.A. 9).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 411.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

GEORGE SAM MAGIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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1.

(Government's Brief, pp. 8-11.)

The Court of Appeals below affirmed the conviction of petitioner of violating Tit. 18, § 1621, U. S. C. (perjury), by sustaining as without error the record of his trial which disclosed that although the trial judge had charged the jury—

> (1) that the essence of the crime was not objective disparity between fact and utterance, but subjective disparity between knowledge and utterance,

he had also charged—

> (2) that in determining whether petitioner harbored knowledge contrary to utterance the jury might

roam over all the evidence in the case and draw its conclusion circumstantially on the basis of "everyday common sense and knowledge" (App. 134-136)

There was no direct evidence of a fact emanating from the defendant showing that he had knowledge contrary to the statements made by him which furnished the basis of the prosecution.

Faced with the argument that the Second Circuit Court of Appeals, in **U. S. v. Remington**, 191 F. 2d 246 (cert. den. 343 U. S. 907), had held that a perjury conviction cannot stand without direct evidence by two witnesses (or one witness, corroborated) of facts emanating from the defendant showing a state of mind on his part contradicting his utterance, the Court of Appeals admitted the conflict but asserted that it would not conform because it believed the **Remington** decision to be "erroneous" (Pet., 50-51).

Faced with the argument that repeated federal decisions (including **Remington**) had ruled that a conviction of perjury may not be had on circumstantial evidence, the Court of Appeals responded by holding that "it is clear" that there are actually two elements of the crime of perjury —objective disparity and subjective disparity—and that circumstantial evidence is sufficient to prove the latter element "just as circumstantial evidence can be used in other criminal cases to establish guilt of an accused beyond a reasonable doubt" (Pet., 47, 48, 51).

The government now seeks to avoid the impact of this Court's Rule 19 (b) by taking the position (a) that notwithstanding the admission of conflict by the Court of Appeals below there actually is no conflict, and the Court of Appeals below simply did not understand the decision in **Remington**, and (b) that although circumstantial evidence may properly be relied upon to show perjurious knowledge, still there was, as a matter of fact, "substantial

direct evidence" below "from which the jury properly inferred" petitioner's knowledge contrary to his statements (Brief, 8-11).

(a)

The Court of Appeals below did not misunderstand or misinterpret **Remington**, and the only way in which the government can now make an argument that it did is by suppressing portions of the language of the Second Circuit court and of this Court in its quotations.

Thus, although on pp. 9 and 10 of its brief the government purports to quote **Remington** to show that any construction of it which would apply the so-called "two-witness" rule to the requirement of knowledge contrary to utterance is a "misinterpretation" of the decision, it simply neglects to quote **Remington's** ultimate and decisive ruling (191 F. 2d 249):

> "Hence the doctrine that perjury must be proved by the direct testimony of two witnesses or one corroborated witness means that the witnesses must testify to some 'overt act' from which the jury may 'infer' the accused's actual belief."

Again, although in its quotation from **Remington** the government purports to requote the opinion of this Court in **American Communications Association v. Douds**, 339 U. S. 382, 411, it excises the final two sentences of the quotation, upon which **Remington** specifically relied (191 F. 2d 249):

> "False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind. In the absence of such manifestations, which are as much 'overt acts' as the act of joining the Communist party, there can be no successful prosecution for false swearing."

Set in juxtaposition, the operative rulings of the two decisions are as follows:

Remington holds:	**The opinion below** holds:
A conviction under § 1621 cannot stand without evidence by two witnesses (or one witness, corroborated), showing knowledge on the part of the defendant contrary to his utterance. 191 F. 2d 249.	A conviction under § 1621 can stand without evidence by two witnesses (or one witness, corroborated) showing knowledge on the part of the defendant contrary to his utterance. Pet., 50, 51.
The evidence of knowledge contrary to utterance must consist of direct evidence of overt acts emanating from the defendant showing his state of mind. 191 F. 2d 249.	The evidence of knowledge contrary to utterance need not be direct evidence of overt acts emanating from the defendant; it may be wholly circumstantial. Pet., 50, 51.

It is not possible, we submit, rationally to assert that these rulings do not present a square and definite conflict.

(b)

The "substantial direct evidence from which the jury properly inferred that petitioner intended to testify falsely," as the government puts it, consisted, according to the government, of petitioner's personal income tax returns and petitioner's statements before the grand jury that he had known Dowling for three or four years and that Wortman had been his friend and neighbor nine years.

The personal income tax returns did not contain a line, word or syllable showing that Dowling or Wortman or either of them held or owned any interest in the gaming ventures. Petitioner was not charged with testifying be-

fore the grand jury that he did not own a share in the ventures; he was indicted for testifying that he had never been a business associate or partner with Dowling or Wortman. We do not believe that it can be argued fairly that an admission that one has received dividends from an enterprise is even circumstantial evidence that he knew other owners of interests in the enterprise, but to assert that it is direct evidence of a manifestation of a state of mind including that precise knowledge is simply absurd. And it is not rendered any the less absurd by bundling it up with oral statements by the petitioner that he had known persons shown to have been shareholders for four years and nine years, respectively.

The flat assertion by the government that the petitioner's tax returns were written evidence, emanating from the accused, and thus sufficient to bring the case within the holding in **U. S. v. Wood**, 14 Pet. 430, 439, is indefensible. As has been repeatedly pointed out, the written evidence in **Wood** was in itself directly contradictory of the allegedly perjurious statement. Here the petitioner's tax returns indeed showed that he was a shareholder in the enterprises, and showed that he knew **he** was a shareholder; but that he never denied. His denial, for which he is prosecuted, was that Dowling and Wortman were his business partners or associates; and as to that denial there is not a whisper to the contrary in the tax returns.

The remarks in the opinion of the Court of Appeals below (Pet., 51) that—

> "It would indeed strain a juror's credulity to the breaking point to believe that one who had been associated with a relatively small group in a number of unlawful endeavors for a period of five years, did not know those associated with him."

quoted with approval in the government's brief here, are simply obfuscatory of the question in issue. No one below

argued what the jury should, or should not have, believed; what was argued was whether the government adduced evidence which, under the law, was sufficient to warrant a conviction for the particular crime charged.

(c)

Both the Court of Appeals below and the government before this Court hinge the case on the theory that there are two elements in a prosecution for violation of § 1621 — the element of objective falsity (or disparity between fact and utterance) and the element of subjective falsity (or disparity between belief and utterance). The truth (which we pointed out below and our petition here) is that there are not two elements of the crime denounced by the statute, but only one, and that one is the disparity between belief and utterance.

The section does not denounce as criminal the stating under oath of that which is not factually so; it does not denounce the stating under oath of that which is not factually so and which is not believed to be so; it simply denounces the statement of that which the person "does not believe to be true," without more.

What the Court of Appeals has done, and what the government would have this Court do, is read into the statute more than is contained therein and then transfer to the element thus created out of thin air all the stringent rules applicable to the prosecution, leaving the element actually in the language of the law to be proved by any means acceptable to general criminal procedure.

2.

(Government's Brief, pp. 11-12.)

Again demonstrating a lack of candor, the government purports to meet petitioner's contention that he was de-

nied a substantial constitutional right by the trial court's refusal to subpoena grand jurors by misrepresenting petitioner's argument. "The argument [of petitioner]," the government asserts (Brief, 11), "is that such witnesses [the grand jurors] could have testified to facts bearing on the materiality of the false testimony and on whether petitioner made the statements charged." It then goes on to state (Brief, 12): "[Petitioner] did not [at trial] and does not now point to anything elicited on cross-examination nor to any other evidence which would show a basis for a reasonable belief that there would be contrary evidence [to that coming from one grand juror who was put upon the stand by the government] from other jurors."

The government thereby simply ignores the principal contention of petitioner (Pet., 22, 23) that "both the indictment and the government's evidence suggested that the investigation in progress when the petitioner allegedly perjured himself might well have been an investigation within the cognizance of a grand jury in the Southern District of Illinois, where the office of the Director of Internal Revenue having jurisdiction over the territory is located, rather than that of the Eastern District of Illinois; yet if that were true no crime could have been committed in the Eastern District, regardless of how false the statements were."

And it further ignores petitioner's secondary contention (Pet., 23) that "even if this Court should not agree [that the record suggested a lack of territorial jurisdiction on the part of the grand jury], petitioner should have been afforded an opportunity to establish, if he could, that the activities of the grand jury below—the same grand jury indicted him that heard his alleged perjury—were not true inquisitorial exercises, but in fact were excursions with the purpose of extracting testimony with a view to perjury prosecution."

The government here does not allude to, but simply repeats, the inconsistency of the opinion of the Court of Appeals in ruling concurrently that grand jury proceedings are secret, but that the government may purport to disclose them by a single witness and the defendant is thereafter bound by that disclosure, and cannot inquire further.

3.

(Government's Brief, pp. 12-13).

The government does not allude to the crux of petitioner's complaint: that the prosecution below proceeded to elicit the claim to the protection of the Fifth Amendment a total of 74 times from witnesses who had previously been identified as friends or associates of the petitioner, and then, in respect of substantially half the questions, went ahead and proved the matters by other witnesses who did not claim the privilege and who were available to the prosecution from the start of the trial.

It was this conduct on the part of the prosecution, carried out after its refusal to engage in a pre-trial inquiry to determine whether the prospective witnesses would claim the privilege in front of the jury, that forms the basis of the petitioner's assertion of bad faith.

The assertion of the government here (Brief, 13) that petitioner's contention that the prosecution knew the witnesses would claim the privilege "has no factual basis" seems hollow indeed when it is considered that the prosecution was asked to participate in an inquiry to determine precisely that matter, and refused.

4.

(Government's Brief, pp. 14-18).

The government ignores or misstates certain basic facts in respect of the validity of the grand and petit juries in the case.

The **clerk alone** determined the qualification of jurors; some via questionnaires and some solely by friendship (App. [Appellee] 3-4; 26).

The questionnaires omitted an essential qualification, conviction of a crime (App. [Appellee] 1-19; Gov. Ex. 1—Questionnaire).

The government (Brief, 17) erroneously refers to the summons (Gov. Ex. 2) served on jurors whose names had previously been placed in the box as supposedly "qualified" jurors.

The clerk did not know and had never determined that 300 qualified jurors resided within the restricted area from which they were drawn (App. [Appellee] 11-18).

The grand jury **was in fact** drawn from a 150-mile restricted area (App. [Appellee] 32; Deft. Ex. 1—List of jurors drawn; Deft. Ex. 2—Map of district showing all jurors drawn **residing** within 150 miles of E. St. Louis; Deft. Ex. 3—Statement of jurors residing in all counties in district; Deft. Ex. 3A showing population of each county in District [submitted re Mofion to Dismiss].)

The petit jury was expressly drawn from the restricted area, pursuant to court order.

All jurors were drawn by a **sorting** process, in which neither the clerk nor jury commission inspected the names discarded by the other to determine if such discarded jurors were properly excluded (App. [Appellee] 23-24—Reed—Clerk; 28—Bolen—Jury Commissioner).

This process permitted the most arbitrary and capricious selection of jurors conceivable. Courts have consistently held that a showing of prejudice is unnecessary where the "capacity" therefor clearly exists.

In this case, the grand jury was drawn by the "sorting" process from a restricted area even though the court order did not expressly so order. Bolen J. Carter, jury commissioner, in his affidavit attached to the motion to dismiss, expressly so stated, and in his testimony (App. [Appellee] 32) he stated he had no recollection of not using the sorting process within the prior five or six years.

The defendant submitted certain exhibits in support of his motion to dismiss. Deft. Ex. 1 was a copy of the jury as drawn, containing names and addresses of the 30 jurors drawn, and the 22 used. Deft. Ex. 2 was a map of the State of Illinois, outlining the Eastern District of Illinois, and showing thereon the location by counties of the several jurors so drawn. The clerk verified this (App. [Appellee] 14). **All jurors** were drawn from 19 out of 45 counties—**all** located within 150 miles of East St. Louis.

Deft. Ex. 3—3a was a statistical analysis of the 45 counties in the Eastern District of Illinois, showing the number of jurors in the box in each county, and the population of each county (App. 15-16).

This analysis revealed that the population, and number of jurors in the jury box for the counties outside the 150 mile area was approximately equal to those within the restricted area.

And yet,—not one juror was drawn from within the restricted area.

The mathematical probabilities of drawing **30 jurors** from 19 counties, all within an area of 150 miles, and not **one juror** from beyond that area, are so remote as not to be arguable. This, coupled with the direct evidence of the

jury commissioner that the jury was in fact so drawn, constitutes conclusive evidence that the grand jury was improperly drawn—contrary to court order—and by an illegal procedure.

The illegality of **this** grand jury is not one of technicality but of substance. This is the grand jury which heard the defendant's testimony, upon which the indictment is based. It was a competent **tribunal**.

The government suggests that the trial court's order restricting the trial jury to an area within 150 miles of East St. Louis was proper—to conserve transportation expenses.

Even if **legally** so drawn—is not justice more important than economy? The defendant had insisted—by several motions to transfer—accompanied by voluminous documents—that a fair trial could not be secured with jurors drawn from near E. St. Louis. Despite this showing, the court deliberately restricted the trial jury to that area. Restriction—by the express wording of the statute—is to be employed to secure justice—by an impartial trial—not the reverse.

5.

(Government's Brief, pp. 19, 20.)

The government fails, in its reply brief, to answer several serious charges of denial of due process in prejudicial proceedings contained in the defendants' petition.

The government specifically omits any attempt to defend against the charge of trickery or bad faith, amounting to entrapment as charged in defendant's petition. The government has never denied these charges. To explain them would require an admission that the defendant is not in fact guilty of the charges contained in the indictment. (See analysis contained in Petition for Rehearing, 5 to 21; 57 to 70.)

The government answers only that portion of denial of due process relating to refusal of the trial court to permit an attorney for the defendant to withdraw from the case. In so answering the government incorrectly states or misinterprets a part of the record.

A reading of the entire record on the motions to withdraw and for continuance will reveal certain ambiguities. On June 19th, 1959, the court denied the motion to withdraw. On June 23rd only one motion—that for a continuance, was presented. Upon discussion thereof the court indicated he would permit the withdrawal. However, after granting the continuance, the court then specifically reconsidered the motion to withdraw and again specifically denied it. Mr. Raemer made a motion to strike which was granted. The motion does not state what was to be stricken. The government asserts it was the motion to withdraw, which had just been specifically denied. Ray M. Foreman, the attorney, knows this is not so for he approached the bench immediately thereafter and asked the court if he had not made a mistake in the order, denying the withdrawal, in view of his previous statements and of his allowance of the continuance. The court stated emphatically that there was no mistake; that the motion to withdraw was again denied. This conversation does not appear in the record and is here given solely to correct the misinterpretation placed in the discussion and motion to strike made by the government. The defendant and his attorney, Ray M. Foreman, have always assumed that the motion to withdraw was denied.

The attorney refrained from active participation in the trial because it was believed it might become necessary for him to testify, despite the court's ruling. However, in view of the lack of any direct evidence by the government as to the defendants' guilt, such attorney was not requested to become a witness.

CONCLUSION.

Petitioner respectfully submits that the petition for a writ of certiorari prayed should be allowed.

Respectfully submitted,

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No. 411.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

GEORGE SAM MAGIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

On Denial of Certiorari to United States Court of Appeals for the Seventh Circuit.

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PETITION FOR REHEARING

On Denial of Certiorari to United States Court of Appeals for the Seventh Circuit.

The petitioner herein, George Sam Magin, now respectfully prays that this Court grant a rehearing or reconsideration of its order of December 5, 1960, denying the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

And he respectfully refers to the suggestions annexed hereto, and by reference made a part hereof, as grounds therefor.

RAY M. FOREMAN,
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Danville, Illinois,

EMERSON BAETZ,
200 West Third Street,
Alton, Illinois,
Attorneys for Petitioner.

CERTIFICATE.

I hereby certify that the within petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the ground specified and filed for the reason that it is truly believed that the Court may have overlooked or misapprehended the point made.

Ray M. Foreman.

SUGGESTIONS.

Petitioner respectfully suggests that this Court, in denying his application for a writ of certiorari, has overlooked the fact that the decision of the Court of Appeals sought to be reviewed has in terms conceded a conflict between the conclusion reached by it and the Court of Appeals for the Second Circuit (Petition for Certiorari [Opinion of Court of Appeals], pp. 50, 51).

Petitioner realizes that Rule 19 (1) of this Court expressly asserts that a conflict between courts of appeals is not a "controlling" reason for the issuance of certiorari, but he respectfully points out that in the case at bar there is not only a conflict, but that the conflict arises because of the conclusion of the Seventh Circuit Court of Appeals that the Second Circuit Court of Appeals incorrectly construed a decision of this Court.

It would, therefore, seem that public interest would indicate that further exploration of the question by this Court would be appropriate.

And this conclusion, petitioner respectfully suggests, would appear to be emphasized when it is considered that the Seventh Circuit Court of Appeals, in reaching its decision, was required to read into the applicable statute (18 U. S. C., § 1621) an element of a crime not expressly therein set out (Petition for Certiorari, p. 18). As the opinion of the Seventh Circuit now stands, the prosecution must not only prove that the defendant charged with perjury did not believe that his utterances were false, but it must also prove that the utterances were not objectively true. The latter requirement cannot be found in the statute.

It might be assumed that a defendant cannot be prejudiced by reading into a criminal statute a requirement that

the prosecution prove an additional element, and this ordinarily would be true. The vice, however, in connection with a perjury prosecution is that it permits the transfer of all the strict rules of evidence from the act denounced by the express words of the law, and leaves the defendant subject to conviction simply on circumstantial evidence — as, indeed, the Court of Appeals below frankly held (Petition for Certiorari [Opinion of Court of Appeals], p. 51).

Petitioner here was probably guilty of a tactical error in burdening his petition with a multitude of points, thus unnecessarily obscuring, or minimizing, each of them. Regardless of this Court's view as to the majority of them, however, petitioner believes that it is in the interest of the orderly administration of the criminal law that the express conflict between the Court of Appeals for the Second Circuit in U. S. v. Remington, 191 F. 2d 246, and the Court of Appeals for the Seventh Circuit in the case at bar be settled by the consideration and judgment of this Court.

Respectfully submitted,

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